10-169-199
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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1890.

No. 1244.

THE UNITED STATES, APPELLANT,

vs.

A. J. VAN DUZEE.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF IOWA.

FILED AUGUST 21, 1890.

THE LAW ASSOCIATION
—OF—
PHILADELPHIA

SUPREME COURT OF THE UNITED STATES.

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#44331
Recd
7/28/27

1 THE UNITED STATES OF AMERICA,
Northern District of Iowa, ss:

Be it remembered that therefore, to wit, on the 25th day of October, A. D. 1889, a petition was filed in the office of the clerk of the United States district court in and for the northern district of Iowa, which petition is in the words and figures following, to wit:

In the United States district court for the northern district of Iowa, eastern division.

A. J. VAN DUZEE
vs.
THE UNITED STATES OF AMERICA.

Your petitioner, A. J. Van Duzee, a resident of the city of Dubuque, in said district, avers and states, that in the month of August, A. D. 1882, he was duly appointed clerk of the United States district and circuit courts in and for the northern district of Iowa, and duly qualified as such clerk, and entered upon the discharge of his duties as such clerk, and has been from said August, 1882, and now is, the only duly qualified clerk as aforesaid.

That the defendant, the United States of America, became and now is indebted to said plaintiff for work and labor performed as such clerk during the time from July 1st, 1885, to June 30th, 1889, in the sum
2 of five hundred and eighty-seven and $\frac{15}{100}$ dollars, which said sum defendant has neglected and refused to pay, though often requested, and still neglects and refuses to pay, and the whole of said claim of $587.15 is due and unpaid.

A bill of items of said claim for work and labor done as aforesaid is hereto attached and made a part hereof.

Plaintiff avers that he has duly presented to the proper accounting officers of defendant a claim for the items embraced in said account for payment, which said accounting officers have refused to allow.

Wherefor plaintiff prays judgment in his favor and against defendant for the sum of five hundred and eighty-seven and $\frac{15}{100}$ dollars.

A. J. VAN DUZEE,
Plaintiff.

UNITED STATES OF AMERICA,
Northern District of Iowa, ss:

I, A. J. Van Duzee, upon oath, do say that I am the plaintiff in the foregoing-entitled cause; that I have read the foregoing petition, and that the matters and things therein set forth are true, as I verily believe.

A. J. VAN DUZEE.

Subscribed and sworn to by said A. J. Van Duzee before me this 23rd day of October, A. D. 1889.

[SEAL.] ALFRED HOBBS,
U. S. Commissioner, N. Dist. of Iowa.

3 *United States of America to A. J. Van Duzee, Dr., for services rendered as clerk of the United States circuit and district court in and for the northern district of Iowa, as follows:*

During the six months from July 1st to December 31st, 1885.

No. 1.

Filing papers received from commissioners of the United States circuit court in causes to which the United States is party plaintiff. Docketed and numbered, viz:

No. 2809, 7 papers.	No. 2810, 5 papers.	No. 2811, 4.
" 2812, 5 "	" 2813, 6 "	" 2814, 4.
" 2815, 6 "	" 2816, 7 "	" 2817, 3.
" 2818, 5 "	" 2819, 5 "	" 2820, 5.
" 2821, 6 "	" 2822, 6 "	" 2823, 6.
" 2824, 4 "	" 2825, 4 "	" 2826, 6.
" 2827, 6 "	" 2828, 4 "	" 2829, 6.
" 2830, 6 "	" 2831, 4 "	" 2832, 6.
" 2833, 4 "	" 2834, 5 "	" 2835, 5.
" 2836, 6 "	" 2838, 5 "	" 2839, 6.
" 2840, 6 "	" 2841, 5 "	" 2842, 5.
" 2845, 4 "	" 2846, 3 "	" In eastern.
" 114, 8 "	" 115, 8 "	" 116, 8.
" 117, 8 "	" 118, 16 "	" 119, 8.
" 120, 8 "	" 121, 8 "	" 122, 8.
" 123, "	" In western division.	

In all, 267 papers filed, at 10c. each	26.70	
Deduct allowed by accounting officers & paid	9.20	
		17.50

No. 2.

Filing appointment of T. M. Hopkins, deputy U. S. M	.10	
Recording same, 2 fo	.30	
Filing 2 oaths of office of T. M. Hopkins, deputy U. S. M	.20	
Recording same, 3 fo	.45	
Filing 2 oaths of officer of Anton Schulte, special deputy U. S. M	.20	
Recording same, 3 fo	.45	
Forward	1.70	17.50
4 Brought forward		17.50
" "	1.70	

No. 2—Continued.

Filing appointment of J. M. Holbrook, deputy U. S. M	.10	
Recording same	.30	
Filing 2 oaths of office of J. M. Holbrook, deputy U. S. M	.20	
Recording same	.45	
Filing bond of J. M. Holbrook, deputy U. S. M	.10	
Recording same, 5 fo	.75	
Filing appointment of J. T. Holbrook, special deputy U. S. M	.10	
Recording same, 1 fo	.15	
Filing 2 oaths of officer of J. T. Holbrook, special deputy U. S. M	.20	
Recording same, 3 fo	.45	
		4.50

No. 3.

Copy of indictment furnished defendant at his request in cause No. 61, U. S. vs. Michael Carlin, western division, under indictment for selling liquor to Indians. 9 fo., at 10 ..... .90

No. 4.

Making final entries in the following cases, in eastern division, November term, numbered 2760, 2800, 2810, 2811, 2813, 2814, 2815, 2816, 2817, 2818, 2819, 2921, 2822, 2823, 2824, 2825, 2826, 2827, 2828, 2829, 2830, 2831, 2832, 2833, 2834, 2835, 2841, 2842—28 cases, 1 fo. each, .15 ..... 4.20

No. 5.

Entering marshal's return of subpœna, viz:		
19 sub. for witnesses before grand jury in western division, Oct. term, 1 fo., at .15	2.85	
44 sub. for witnesses before grand jury, in eastern division, Nov. T., each 1 fo., at .15	6.60	
2 sub. for witnesses in cause No. 2760, eastern division, Nov. T., each 1 fo., .15	.30	
		9.75
Forwarded		36.85
5 Brought forward		36.85

No. 6.

Entering presentment of G. J., Nov. term in eastern div. in following numbered cases, viz: 2816, 2817, 2819, 2826, 2828, 2831, 2836, 2839, 2840, 2842, 2813, 2814, 2815, 2818, 2829, 2841, 2843, 2921, 2810, 2822, 2824, 2825, 2827, 2832, 2833, 2834, 2835—27 cases, each 1 fo., at 15	4.05	
Deduct allowed by accounting officers & paid	1.20	
		2.85

No. 7.

Dockets, index, & taxing costs, Nov. term in eastern div. in following numbered causes, viz: 2813, 2814, 2815, 2818, 2823, 2829, 2841, 2843, 9 cases, 1 fo. each		9.00

In six months, from Jan. 1st to June 30, 1886.

No. 8.

Oaths to 5 bailiffs, April term, 1886	.50	
" " 5 " Jan. term, 1886	.50	
Oaths to 5 bailiffs, June term, 1886	.50	
Oaths to 5 bailiffs, May term, 1886	.50	
		2.00

No. 9.

Filing order appointing Thos. Hardie jury comsr., eastern division	.10	
Making copy of same	.10	
Cert. & seal to copy of order above	.35	
		.55

No. 10.

For filing testimony taken by grand jury, April term, and returned into court by said jury in causes numbered as follows: 2848, 2849, 2851, 2852, 2853, 2854, 2855, 2856, 2857, 2859, 2860, 2861, 2862, 2863, 2864, 2865, 2866, 2867, 2868, 2869, 2870, eastern division, 21 cases, .10 each..	2.10	
63, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 90, 92, 94, 95, 96, 97, 98, 99, 100, 101, 102, 105, 106, 107, 108, 109, 110, 111, 112, 113, 174, 115, 116, 104, central division, 50 cases, at .10	5.00	
Forward	7.10	51.25
6 Brought forward		51.25
Brought forward	7.10	

No. 10—Continued.

124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 142, 143, 144, 146, 148, 149, 151, 152, 153, 154, 157, 158, 159, 172, 173, western division, 28 cases, each .10	2.80	
	9.90	
Allowed and paid by accounting officers	.55	
		9.35

No. 11.

Filing oaths of office of T. P. Murphy as U. S district attorney, 2 at .10, 20	.20	
Recording said oaths, 2 fo	.30	
Administering oath of office to Wm. Graham as assistant U. S. district atty., 10c., seal .20	.30	
Recording said oath, .2 fo., .15, .30; filing same, .10	.40	
		1.20

No. 12.

Filing papers received from the commissioners of the U. S. circuit court in causes to which U. S. in party plaintiff, docketed and numbered as follows: 2848, 6 papers; 2849, 5 papers; 2850, 5 papers; 2851, 5 papers; 2854, 6 papers; 2855, 5 papers; 2856, 5 papers; 2857, 5, papers; 2858, 5 papers; 2859, 5 papers; 2860, 5 papers; 2861, 5 papers; 2862, 6 papers; 2863, 6 papers; 2864, 5 papers; 2865, 6 papers; 2866, 5 papers; 2867, 5 papers; 95 papers, 10c. each	9.50	
Allowed and paid by accounting officers	1.65	
		7.85

No. 13.

Certified copy of order of court appointing jury commissioner for June term, 1886, furnished commissioner, 1 fo	.10	
Certificate .15, & seal to cert. to said copy	.35	
		.45

No. 14.

Certified copy of order of court appointing jury commissioner, May term, 1886, furnished commissioner, 2 fo. .20, cert. .15, and seal .20.		.55
Forward		70.10
7 Brought forward		70.10

No. 15.

Making copy of indictments in the following numbered cases for defendants as per order of court: 2848, 15 fo., 2849, 5 fo., 2851, 4 fo., 2852, 3 fo., 2860, 3 fo., 2861, 5 fo., 2864, 3 fo., 2869, 3 fo., 2866, 4 fo., 2867, 3 fo., 2868, 4 fo., 2870, 11 fo., in eastern division. 65, 3 fo., 66, 3 fo., 67, 3 fo., 68, 3 fo., 69, 3 fo., 70, 3 fo., 72, 3 fo., 73, 3 fo., 74, 3 fo., 75, 3 fo., 76, 3 fo., 77, 3 fo., 78, 3 fo., 79, 3 fo., 80, 3 fo., 82, 3 fo., 83, 3 fo., 85, 3 fo., 86, 3 fo., 87, 5 fo., 92, 5 fo., 97, 3 fo., 100, 3 fo., 101, 3 fo., 102, 3 fo., 104, 3 fo., 105, 3 fo., 106, 3 fo., 107, 5 fo., 108, 5 fo., 109, 5 fo., 110, 5 fo., 111, 13 fo., 112, 13 fo., 113, 13 fo., 114, 13 fo , 115, 13 fo., 116, 13 fo., in central division. In all, 261 folios at 10c. each.	26.10	
Allowed and paid by accounting officers	.70	
		25.40

No. 16.

Certificate and seals to copy of orders of court to marshal to pay witnesses at April term	.35	
Copy of said order furnished marshal	.70	
Copy of order of court to marshal to pay witnesses at January term, 15 fo. at .10	1.50	
Certificate & seal to said copy	.35	
Copy of order of court to marshal to pay witnesses at June term, 13 fo. .10	1.30	
Certificate and seal to said copy	.35	
		4.55
Forward		100.05
8 Brought forward		100.05

No. 17.

Making final entries in the following numbered cases:		
2565, 2701, 2733, 2849, 2850, 2851 2852, 2854, 2855, 2857, 2858, 2859, 2860, 2861, 2862, 2863, 2864, 2865, 2866, 2867, 2868, 2869, in eastern division, 22 cases at .15	3.30	
63, 64, 66, 67, 68, 69 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 65, 94, 97, 95, 98, 100, 101, 102, 103, 104, 105, 117, in central division, 42 cases at .15	6.30	
127, 128, 129, 130, 131, 136, 145, 146, 148, 149, 151, 152, 153, 154, 157, 158, 159, 161, 162, in western division, 19 cases at .15	2.85	
		12.45

No. 18.

Entering return of marshal of subpœnas of witnesses in cases numbered 62, 1 subpœna, 88, 1 subpœna, 2 at .15	.30	.30

No. 19.

Entering return of marshal of bench warrants in following numbered cases:		
2848 & 2858 in eastern division, 2 at .15	.30	
65, 86, 94, in central division, 3 at .15	.45	
		.75

No. 20.

Entering continuances in following numbered cases: 100, 102, 106, 132, 133, 134, 172, 173, in western division, 8 at .15	1.20	1.20

No. 21.

Entering return of marshal of mittimus in causes 66 & 100, central div., 2 at .15	.30	.30
Forward		115.05
Brought forward		115.05

No. 22.

Entering presentment of grand jury in the following numbered causes: 2848, 2853, 2861, 2866, 2868, 2869, 2850, 2854, 2862, 2863, 2855, 2858, 2865, 2849, 2851, 2852, 2856, 2857, 2859, 2860, 2864, 2867, in eastern division, 22 cases at .15	3.30	
65, 66, 67, 68, 69, 70, 72, 73, 74, 75, 76, 77, 79, 80, 82, 83, 85, 86, 87, 88, 92, 94, 96, 97, 99, 100, 101, 102, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, in central div., 41 at .15	6.15	
	9.45	
Allowed by accounting officers & paid:		
Eastern division 1.20		
Central division 1.20		
	2.40	
		7.05

No. 23.

Dockets, index, & taxing costs in the following numbered causes:		
2850, 2854, 2862, 2863, 2855, 2858, 2865, in eastern division, at 1.00 each	7.00	
63, 64, 71, 81, 84, 90, 91, 93, 78, 89, 98, 103, in central division, at 1.00 each	12.00	
		19.00

In the six months from July 1 to December 31, 1886.

No. 24.

For making for defendants in causes numbered as follows, copy of indictment as per order of court: 2871 (a), 7 fo.; 2874, 2 fo.; 2875, 2 fo.; 2877, 2 fo.; 2878, 2 fo.; 2879, 6 fo,; 2877 (a), 2 fo.; 2878 (a), 2 fo.; 2880, 4 fo.; 2881, 2 fo.: 2882, 2 fo.; 2888, 5 fo.; 2889, 2 fo.; 2892, 2 fo.; 2893, 2 fo.; 2894, 2 fo.; 2895, 5 fo.; 2896, 5 fo.; 2897, 6 fo.; 2898, 6 fo.; 2899, 6 fo.; 2900, 2 fo.; 2901, 2 fo.; 2902, 2 fo .....

Brought forward 141.10

10 Brought forward 141.10

No. 24—Continued.

2903, 2 fo., 2904, 2 fo., 2905, 2 fo., 2906, 2 fo, 2908, 7 fo., 2909, 2 fo., 2910, 3 fo., 2911, 2 fo., 2912, 2 fo., 2913, 2 fo., 2914, 2 fo., 2915, 2 fo., 2916, 2 fo., 2917, 2 fo., in eastern division, 114 folios, at 10c 11.40

No. 25.

For making final entry in each of the following-numbered causes:

2848, 2871a, 2872, 2875, 2876, 2877, 2878, 2879, 2877a, 2878a, 2880, 2881, 2882, 2883, 2884, 2885, 2886, 2891, 2892, 2893, 2894, 2895, 2896, 2897, 2898, 2899, 2900, 2901, 2902, 2903, 2904, 2906, 2907, 2909, 2910, 2911, 2912, 2914, 2915, 2916, 2917, 2918, in eastern division, 42 cases, at .15 each 6.30

132, 133, 134, 142, 143, 172, 174, 175, 177, 178, 179, 180, 184, 185, 186, 187, 188, in western division, 17 cases, at .15 ..... 2.50 8.85

No. 26.

Entering order of trial and verdict in the following numbered causes:

2848, 2871a, 2875, 2877, 2878, 2877a, 2878a, 2881, 2882, 2892, 2893, 2894, 2895, 2896, 2900, 2901, 2902, 2903, 2904, 2906, 2909, 2910, 2911, 2912, 2913, 2914, 2915, 2916, 2917, in eastern division, 28 cases, 2 fo. each, at .15, .30 each 8.40

132, 133, 134, 142, 143, 172, 175, 177, 179, 181, in western division, 10 cases, 2 fo. each, at .15, or .30 each 3.00 11.40

No. 27.

Recording order of court approving official bond of W. M. Desmond, U. S. marshal, 1 fo ..... .15

Recording commission issued to W. M. Desmond as U. S. marshal, 2 fo. .30

Forward ..... .45 172.75

11 Brought forward 172.75

Brought forward ..... .45

No. 27—Continued.

Recording 2 oaths of office W. M. Desmond, U. S. M. ..... .45

Recording official bond W. M. Desmond, U. S. M., 11 fo 1.65

Foregoing in district court, eastern div.

Recording commission issued to said Desmond in circuit court, eastern division, 2 fo ..... .30

Recording approval of foregoing bond in circuit court eastern division, 1 fo ..... .15 3.00

No. 28.

Drawing report of drawing of the juries for Nov. term, 6 fo., first panel	.90	
Drawing report of drawing of the juries for Nov. term, 3 fo, second panel	.45	
Drawing report of drawing of juries for October term, 7 fo	1.35	
		2.70

No. 29.

Filing venire for P. jury, Nov. T. district court	.10	
" " " G. " " " " "	.10	
" " " P. " " " " " 2 panel	.10	
Recording return of marshal of venire for petit jury, Nov. T., 2 fo	.30	
Recording return of marshal of venire for petit jury, Nov. T., second panel, 2 fo	.30	
Recording return of marshal of venire for grand jury, Nov. T., 2 fo	.30	
Recording return of marshal of venire for petit jury, Nov. T., in circuit court record, 2 fo	.30	
Recording return of marshal of venire for petit jury, Nov. T., in circuit court record, 2 panel	.30	
Filing venire for petit jury, Oct. T	.10	
Filing venire for grand jury, Oct. T	.10	
Recording return of marshal of venire, petit jury, Oct. T	.30	
Recording return of marshal of venire, grand jury, Oct. term	.30	
		2.60

No. 30.

Oath to 5 bailiffs at November term,.10	.50	
Entering order appointing crier, Nov. T	.15	
Forward	.65	181.05
12 Brought forward		181.01
Brought forward	.65	

No. 30—Continued.

Recording order appointing crier Oct. T	.65	
Recording same in circuit court	.15	
Swearing 5 bailiffs at October term	.50	
		1.45

No. 31.

Making report to Commissioner of Internal Revenue under sec. 797, R. S., amended Mch. 1, 1879, of moneys received and paid out, dist. court, 4 folios, .15, .60; circuit court, 2 fo., .15, .30 .90

No. 32.

Entering return of subpœnas for witnesses as follows: Causes No. 2488, 2871a, 2, 2879, 2, 2874, 1, 2875, 1, 2880, 1, 2895, 3, 2896, 3, 2903, 2, 2915, 1, 17 in trial causes, and 40 for witnesses before grand jury, November term, in all 56, at .15 each 8.40

No. 33.

Entering return of bench warrants in the following numbered cases: 2874, 2873, 2889, 2905, 2913, eastern division, .15	.75	
111, 112, 113, 114, 115, 116, 107, 109, 110, central division, each, .15	1.35	
		2.10

No. 34.

Entering presentment of grand jury in the following-numbered cases: 2871, 2882, 2888, 2889, 2897, 2898, 2899, 2905, 2908, 2910, 2911, 2913, 2877, 2878, 2902, 2903, 2881, 2900, 2904, 2873, 2874, 2875, 2892, 2893, 2884, 2911, 2906, 2872, 2876, 2883, 2887, 2879, 2880, 2909, 2912, 2914, 2915, 2916, 2917, 2995, 2896, 2884, 2885, 2891, 2877a, 2878a, in eastern division, 46 cases, at .15		6.90	
Less allowed by accounting officers and paid		1.50	
			5.40
	Forward		199.30
13	Brought forward		199.30

No. 35.

Dockets index & taxing costs in the following-numbered cases: 2976, 2883, 2887, 2907, 2872, 2884, 2885, 2891, in eastern division, 8 cases, at 1.00.			8.00

No. 36.

Entering continuances in following-numbered cases: 2942a, 2943, 2943a, 2947a, 2948, 2949, in eastern division, 7 cases, at 15			1.05

In the six months from Jan. 1 to June 30, 1887.

No. 37.

Recording order appointing Thos. Hardie jury commissioner for eastern division		.15	
Filing said order, 10; making copy, 10; certificates and seal, 35		.55	
Filing order appointing jury commissioner for January term, central division		.10	
Recording same, 15; making copy for com., 10		.25	
Certificate & seal to copy		.35	
Filing order appointing jury commissioner for May term, western division		.10	
Recording same, 15; making copy for com., 10		.25	
Certificate and seal to copy for com		.35	
			2.10

No. 38.

Certificates & seals to copies of orders of court furnishing jury commissioners directing drawing of juries for April term, 2 orders, 35 each		.70	
Jan. term, 1 order, 35		.35	
May term, 1 order, 35		.35	
			1.40

No. 39.

Oaths to 5 bailiffs, April term			.50
	Forward		212.35
14	Brought forward		212.35

No. 40.

Filing venire for petit jury, April term		.10	
Recording return of marshal of same, 2 fo		.30	
Recording return of marshal of same circuit court, 2 fo		.30	
Filing venire for grand jury, April term		.10	
Recording return of marshal of same, 2 fo		.30	
Filing venire for 2nd panel petit jurors, same term		.10	
Recording return of marshal of same, 2 fo		.30	
Recording return of marshal of same circuit court, 2 fo		.30	
Filing venire for petit jury, January term		.10	
Recording return of marshal of same, 2 fo		.30	
Filing venire for grand jury, same term		.10	
Recording return of marshal of same, 2 fo		.30	
Recording return of marshal of venire petit jury, circuit court, 2 fo		.30	
			2.90

No. 41.

Entering return of marshal of subpœnas for witnesses as follows: Causes: 2873, 1, 2874, 1, 2888, 2, 2889, 1, 2905, 1, 2908, 1, 2913, 2, 2920, 3, 2919, 2, 2921, 3, 2924, 1, 2928, 1, 2937, 2, 2942, 2, 2942a, 2, 2943, 2, 2943a, 2, 2946, 8, 2946a, 1, and 32 subpœnas for witnesses before grand jury, 70 in all, in eastern division, at 15 ..... 10.00

96, 3, 99, 1, 107, 3, 109, 1, 111, 5, 112, 6, 113, 6, 115, 6, 116, 6, 124, 3, and 10 subpœnas for witnesses before grand jury, 56 in all, in central division, at 15 ..... 8.40

18.40

No. 42.

Entering returns of bench warrants in following numbered cases: 99, 106, 110, 123, 133, in central division, 5, at 15 ..... .75

Forward 234.40

15 Brought forward 234.40

No. 43.

Entering presentment of grand jury in the following-numbered causes:

2920, 2919, 2921, 2922, 2923, 2924, 2925, 2926, 2927, 2928, 2929, 2931, 2932, 2933, 2934, 2935, 2937, 2939, 2940, 2941, 2942, 2943, 2943a, 2944, 2945, 2946, 2946a, 2947, 2947a, 2948, 2949, 2950, in eastern division, 32 cases, at 15 ..... 4.80

95, 119, 120, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, in central division, 15 cases, at 15 ..... 2.25

7.05

Allowed and paid by accounting officers:

Eastern division 1.20

Central division ..... .45

1.65

5.40

No. 44.

Dockets, index, and taxing costs in following-numbered cases:

2929, in eastern division 1.00

121, in central division 1.00

2.00

In the six months from July 1 to Dec. 31, 1887.

No. 45.

Filing præcipies for bench warrants in cases Nos. 2908, 2956, and 2978, in eastern division, 3, at 10 ..... .30

No. 46.

Dockets, index, and taxing costs in cause No. 2967, eastern division . 1.00

1.00

Forward 243.10

16 Brought forward 243.10

No. 47.

Docket, index, & taxing costs in the following-numbered causes:

2975, 2992, 3002, eastern division, 3, at 1.00 ..... 3.00

191, 196, 202, 204, 207, 210, 213, 214, 190, 221, 223, 224, 225, 226, in western division, 14, at 1.00 ..... 14.00

17.00

No. 48.

Seals to copies of orders of court to pay witnesses and jurors, November term, 3, at 35 ..... 1.05

And October term, 1, at 35 ..... .35

1.40

No. 49.

Filing præcipes for mittimus in each of the following-numbered causes:
2889, 2913, 2922, 2923, 2927, 2928, 2931, 2939, 2944, 2925, 2926, 2932, 2933, 2934, 2935, 2940, 2941, in eastern division, 17, at 10 ..... 1.70
182, 192, 197, in western division, 3, at 10 ..... .30 2.00

No. 50.

Recording reports of drawing juries, November term, 8 fo., 1.20, & October term, 7 fo., 1.05 ..... 2.25

No. 51.

Recording return of marshal of venires for petit and grand jury, October term:
Petit jury, 2 fo ..... .30
October term, grand jury, 2 fo ..... .20
In circuit court, October t., petit jury, 2 fo ..... .30 .90

No. 52.

Entering return of marshal of subpœnas for witnesses as follows:
In causes numbered 2888, 4; 2919, 2; 2820, 3; 2947, 1; 2949, 1; 2968, 1; 2978, 1; 2983, 1; 2983a, 1; 2988, 1; 16, at 15 ..... 2.40
And witnesses before grand jury, 63, at 15, all in eastern division. 9.45 11.85

Forward 278.50
17 Brought forward 278.50

No. 53.

Entering presentment of grand jury in the following numbered causes: 2930, 2936, 2951, 2952, 2953, 2954, 2955, 2956, 2956a, 2957, 2958, 2959, 2960, 2961, 2962, 2963, 2964, 2965, 2966, 2968, 2969, 2970, 2971, 2973, 2974, 2975, 2976, 2972, 2978, 2979, 2980, 2981, 2982, 2983, 2983a, 2984, 2985m, 2986, 2987, 2988, 2989, 2991, 2992, 2993, 2997, 2998, 2999, 3003, 3003a, 3005, 3005a, 3006, 3007, 3008, 3009, in eastern division, 56 cases, at 15 8.40
Allowed by accounting officers and paid 1.05 7.35

No. 54.

Entering continuance in following numbered causes: 2870, 2919, 2942, 2951, 2955, 2956a, 2960, 2972, 2981, 2993, 2999, in eastern division, 11 cases, at 15 ..... 1.65
Allowed by accounting officer and paid ..... .30 1.35

In the six months from Jan. 1 to June 30, 1888.

(No. number 55 omitted.)

No. 56.

Making final entries in the following numbered causes:
2919, 2951, 2978, 2881, 2989, 2991, 3003, 3003a, 3005, 3005a, 3012, 3013, 3014, 3016, 3017, 3019, 3020, 3021, 3022, 3023, 3024, 3026, 3027, 3028, 3031, 3033, 3034, 3035, in eastern division, 28 cases at 15 4.20
107, 137, 139, 140, 141, 142, 143, 144, 145, 146, 147, 149, 150, 151, 152 154, 155, 156, 158, 159, 160, 162, central division, 22, at 15 ..... 3.30
188, 205, 206, 211, 212, 222, 235, 237, 238, 239, 240, 241, 242, 243, 244 245, 247, 251, 255, western division, 19 cases, 15 ..... 2.85 10.35

Forward 287.55
18 Brought forward 297.55

No. 57.

Docket, index, and taxing costs in the following numbered cases, 236, 239, 240, 241, 245, 247, 254, in western div. 7, at 1.00 ..... 7.00

No. 58.

Copy of sentence and order of commitment to the penitentiary, of Sam Lawrence, furnished marshal for delivery to warden with prisoner in case No. 3005a, 5 fo., 50; certificate & seal, 35 ..... .85

No. 59.

Seals to copy of orders to marshal to pay witnesses, grand & petit jurors, eastern division, 3, at 30 ..... .60

No. 60.

Filing 10 marshals' accounts, April term, 1888	1.00	
Filing 72 vouchers with said accounts, 10	7.20	
Recording 10 orders of court approving said accounts, 1 fo., 15	1.50	
Making 10 copies said orders for marshal, 1 fo., 10	1.00	
Certificate & seal to each said 10 copies	3.50	
		14.20

No. 61.

Copies of indictments in each of following numbered causes for defendants:

134, 5 fo.; 135, 3 fo.; 136, 3 fo.; 137, 4 fo.; 138, 3 fo.; 139, 3 fo.; 140, 4 fo.; 141, 4 fo.; 143, 4 fo.; 144, 4 fo.; 145, 4 fo.; 146, 4 fo.; 147, 4 fo.; 148, 6 fo.; 149, 6 fo.: 150, 4 fo.; 151, 4 fo.; 152, 4 fo.; 155, 4 fo.; 156, 4 fo.; 157, 4 fo.; 158, 4 fo.; 159, 4 fo.; 160, 4 fo.; 162, 4 fo.; 163, 5 fo., in central division, 108 fo., at 10	10.80	
205, 4 fo.; 248, 6 fo.; in central division, 1 fo., 1.00, & cert. & seal to the two last, 35	1.70	
		12.50

No. 62.

Seals to copy of order to draw juries, furnished the jury commissioners:		
January term, petit jury .20, grand jury, .20	.40	
June " " " .20 " " .20	.40	
May " " " .20 " " .20	.40	
		1.20
Forward		333.90
19 Brought forward		333.90

No. 63.

Seals to copy of order of court appointing jury commissioner furnished said com. January term 20, June term 20, May term 20 ..... .60

No. 64.

Seals to copy of orders of court to marshal to pay grand & petit jurors & witnesses. January term 3 at .20, June term 3 at .20, May term 3 at .20 .. 1.80

No. 65.

Recording report of the drawing of juries:		
April T. dist. court petit & grand jr., 7 fo., 15	1.05	
" " cir. court " jurors, 5 at., 15	.75	
Jan. " dist. ct. petit & grand jurors, 8 fo., at 15	1.20	
" " cir. " " jurors, 6 fo., 15	.90	
Jan. T. dist. ct. 2 panel petit jr., 3 fo., 15	.45	
" " cir. ct. 2 " " " 3 fo., 15	.45	
June " dist. ct. petit & grand jr., 8 fo., 15	1.20	
June " cir. ct. " jr., 6 fo., 15	.90	
May T. dist. ct. " & grand jr., 7 fo., 15	1.05	
May " cir. ct. " jr., 6 fo., 15	.90	
		8.85

No. 66.

Filing venire petit jr. April T. dist ct	.10	
Entering marshal's return of same, 2 fo	.30	
Filing venire grand jr. April T. dist. ct	.10	
Entering marshal's return of same, 2 fo	.30	
Filing venire petit jr. Jan. T. dist. ct	.10	
Entering marshal's return of same, 2 fo	.30	
Filing venire grand jr. Jan. T. dist. ct	.10	
Entering marshal's return of same, 2 fo	.30	
Filing venire petit jr. June T. dist. ct	.10	
Entering marshal's return of same, 2 fo	.30	
Entering marshal's return of venire petit jury circuit court, 2 fo	.30	
Entering marshal's return of venire petit jury circuit court, Jan. T	.30	
Filing venire G. jury June term dist. ct	.10	
Entering marshal's return of same, 2 fo	.30	
Forward	3.00	345.15
20 Brought forward		345.15
Brought forward	3.00	

No. 66—continued.

Filing venire, petit jr., May T. dist. ct	.10	
Entering marshal's return of same, 2 fo	.30	
Filing venire, grand jr., May T. dist. ct	1.10	
Entering marshal's return of same, 2 fo	.30	
Entering marshal's return of venire, petit jury, circuit court, 2 fo	.30	4.10

No. 67.

Recording in final record motion & affidavits for order of court for subpœnas for witnesses for defendant in following-numbered causes:		
2919, 3 fo.; 2920, 6 fo.; eastern division, 9 fo., .15	1.35	
133,.5 fo.; central division, 5 fo., .15	.75	
	2.10	
Allowed by accounting officer & paid	1.50	.60

No. 68.

Recording in final record sentence & judgment in the following-numbered causes:		
2951, 2 fo.; 2978, 3 fo.; 2891, 3 fo.; 3003, 3 fo.; 3005a, 6 fo.; 2012, 3 fo.; 3013, 3 fo.; 3014, 3 fo.; 3016, 3 fo.; 3017, 3 fo.; 3020, 3 fo.; 3021, 3 fo.; 3022, 3 fo.; 3023, 3 fo.; 3024, 3 fo.; 3026, 3 fo.; 3027, 3 fo.; 3028, 3 fo.; 3031, 3 fo.; 3033, 3 fo.; 2952, 3 fo.; 2953, 3 fo.: 2957, 3 fo.; 2958, 3 fo.; 2959, 3 fo.; 2961, 3 fo.; 2962, 3 fo.; 2963, 3 fo.; 2964, 3 fo.; 2965, 3 fo.; 2966, 3 fo.; 2968, 3 fo.; 2969, 3 fo.; 2970, 3 fo.; 2971, 3 fo.; 2973, 3 fo.; 2974, 3 fo.; 2976, 3 fo.; 2977, 3 fo.; 2979, 3 fo.; 2980, 3 fo.; 2982, 3 fo.; 2983a, 3 fo.; 2985, 3 fo.; 2986, 3 fo.; 2987, 3 fo.; 2988, 3 fo.; 2997, 3 fo.; 2898, 3 fo.; 3006, 3 fo.; 3007, 3 fo.; 3008, 3 fo.; 2984, 3 fo.; 3006, 3 fo.; 3007, 3 fo.; 3008, 3 fo.; 2984, 3 fo., in eastern division, 161 fo., at .15	24.15	
137, 139, 140, 141, 143, 144, 145, 146, 147, 149, 150, 151, 152, 155, 156, 158, 160, 162, in central division, 18 cases, 3 fo., 54 fo., at .15	8.10	
Forward	32.25	349.85
21 Brought forward		349.85
Brought forward	32.25	

No. 68—Continued.

Allowed by accounting officer and paid	23.40	8.85

No. 69.

Recording in final record bench warrants and return of marshal on same in following-numbered causes:		
2978, 4 fol.; 2809, 4 fol.; eastern division, 8 fo., .15	1.20	
111, 112, 123, 133, 141, in central div., 15 fo., .15	2.25	
154, central division, 4 fo., .15	.60	
	4.05	
Allowed by accounting officer and paid	3.30	
		.75

No. 70.

Recording in final record bail bonds in the following-numbered cases:		
2910, eastern division, 3 fo., .15	.45	
Allowed by accounting officer and paid	.30	
		.15

No. 71.

Entering returns of marshal of service of subpœnas of witnesses as following in eastern division: 2978, 2951, 2956, 1 each, 3, at .15	.45	
2989, 3 fo.; 2991, 1 fo.; 3003, 4 fo.; 3005, 4 fo.; 3018, 1 fo.; 3019, 1 fo.;		
3022, 1 fo.; 3025, 1 fo., 16, at .15	2.40	
And 30 for witnesses before grand jury, .15	4.50	
		7.35

No 72.

Issuing subpœnas in the following-numbered cases in eastern division:		
2956, 1; 2989, 3; 2991, 1; 3022, 1; 6, at .25		1.50

No. 73.

Filing subpœnas in the following-numbered cases in eastern division:		
2951, 2956, 2981, 1 each; 2989, 3; 2091, 1; 3003, 4; 3018, 1; 3019, 1;		
3022, 1; 3025, 1; in all, 15, at .10	1.50	
		1.50

Forward		369.95
22 Brought forward		369.95

No. 75.

Entering return of marshal of subpœnas for witnesses in the following-numbered cases: 107, 2; 111, 4; 112, 3; 113, 3; 114, 3; 115, 3; 116, 3; 123, 1; 133, 2; 134, 3; 135, 1; 136, 2; 141, 1; 146, 2; 153, 1; 159, 3; in central division 51 at .15	7.65

No. 75.

Entering marshals return of bench warrant in causes numbered 141, central division	.15

No. 76.

Entering continuance in following numbered cases: 256, 257, 258, 259, in western div., 4, .15	.69

No. 77.

Entering return of marshal of mittimus in case No. 197, central division		.15
Entering presentment of grand jury in the following-numbered causes:		
3012, 3013, 3014, 3016, 3017, 3018, 3019, 3020, 3021, 3022, 3023, 3024, 3025, 3026, 3028, 3031, 3032, 3033, 3034, 3035, 3036, in eastern division, 21, at .15	3.15	
134, 135, 136, 136, 137, 138, 139, 140, 141, 143, 144, 145, 146, 147, 148, 149, 150, 151, 122, 155, 156, 157, 158, 159, 160, 162, 163, in central division, 26, at .15	3.90	
	7.05	

No. 78.

Allowed by accounting officer & paid :		
Eastern division .60 ; central division .90	1.50	
		5.55

No. 79.

Docket, index & taxing costs in the following-numbered causes :		
2999, 3015, 3029, in eastern division, 3, at 1.00	3.00	
142, in central division, 1 at 1.00	1.00	
		4.00
Forward		388.05
23 Brought forward		388.05

No. 80.

Entering continuances in the following numbered causes : 2942, 2942a, 2943, 2943a, 2947, 2947a, 2948, 2949, 2956, 2960, 2972, 2991, 2993, 3009, 3030, 2870, 2908, in eastern division, 17 at .15	2.55	
Allowed by accounting officer & paid	.45	
		2.10

In six months from July 1 to Dec. 31, 1888.

No. 81.

Docketing, index & taxing costs in the following numbered causes :		
2960, 3029, 3064, 3065, 3066, 3096, 3108, in eastern division, 8 cases 1.00 each	8.00	
261 and 262 in western division 2 cases 1.00	2.00	
		10.00

No. 82.

Drawing bonds in the following numbered cases : 3071, 3104, 3136, 3138, 3139, in eastern division, 3 fo., each 15 fo., .15	2.25	
Allowed by accounting officer & paid	2.00	
		.75

No. 83.

Entering order of court approving acct. A. Hobbs, U. S. Come'r, 2 fo.	.30	
Making copy of same .20, certificate & seal to same .35	.55	
Entering order of court approving acct. A. J. Van Duzee, clerk	.30	
Making copy of same .20, cert. & seal .35	.55	
Filing report of U. S. Attorney upon acct. A. Hobbs, U. S. Com'sr	.10	
Filing report of U. S. attorney upon acct. A. J. Van Duzee, clerk	.10	
Filing duplicate account A. J. Van Duzee, clerk	.10	
Entering order of court approving acct. T. P. Murphy, U. S. atty	.60	
Making copy of same .40, 2 cert. & seal .70	1.10	
Filing 2 duplicate accounts T. P. Murphy, U. S. Atty	.20	
Entering 13 orders, approving 13 accounts, W. M. Desmond, U. S. marshal, 18 fo., .15	2.70	
Forward	6.60	
		400.90
24 Brought forward		400.90
Brought forward	6.60	

No. 83—Continued.

Making 13 copies of said orders, 18 fo, 10	1.80
13 cert. & seals to said copies, .35 each	4.55
Filing 13 duplicate accounts & 90 duplicate vouchers, W. M. Desmond, U. S. M., 103 papers, .10	10.30

Filing 12 reports of U. S. attorney upon accounts of W. M. Desmond, U. S. M., 10c. each	1.20	
Entering order approving account T. G. Henderson, U. S. com., 2 fo..	.30	
Making copy of same, .20; cert. & seal, .35	.55	
Filing report U. S. Atty. upon said account	.10	
Entering order approving account W. H. Johnson, U. S. com	.30	
Making copy of same, .20; cert. & seal, .35	.55	
Filing report of U. S. attorney on said account	.10	
		26.35

No. 84.

Certificate, .15. & seal, .20, to copy of orders to marshal to pay grand & petit jurors & witnesses:		
October term, 3.35	1.05	
November term, Fort Dodge, 3.35	1.05	
November term, Dubuque, 3.35	1.05	
	3.15	
Allowed by accounting officers & paid	.75	
		2.40

No. 85.

Certificate, .15, & seal, .20, to copy of orders to draw juries & appoint-pointing jury commissioners furnished to jury commissioners:		
October term, 2.35	.70	
November term, Fort Dodge, 3.35	1.05	
November term, Dubuque, 2.35	.70	
Allowed by accounting officers & paid	1.45	
		1.00
Forward		430.65
25 Brought forward		430.65
Recording in final record, transcripts from U. S. circuit court commissioners causes numbered as follows: 246, 4 fo., 249, 5 fo., 252, 4 fo., 253, 6 fo., 260, 6 fo., 264, 5 fo., 265, 5 fo., 266, 4 fo., 268, 3 fo., 269, 6 fo., 272, 5 fo., 188, 5 fo., 205, 4 fo., 206, 5 fo., 211, 5 fo., 212, 5 fo., 222, 5 fo., 235, 5 fo., 237, 5 fo., 238, 5 fo., 242, 5 fo., 243, 5 fo., 244, 5 fo., 251, 5 fo., 255, 5 fo., in western division 122 fo., 15 ...	18.30	
Recording in final record bail bonds in following numbered causes: 246, 4 fo., 249, 4 fo., 252, 4 fo., 253, 4 fo., 26 i, 4 fo., 268, 5 fo., 188, 4 fo., 205, 4fo., in western division	4.95	
Allowed & paid by accounting officers	2.40	
	2.55	
Recording in final record, mittimus & return of marshal on same in following numbered causes: 265, 3 fo., 266, 3 fo., 268, 3 fo., 269, 3 fo., 271, 4 fo., 242, 4 fo., 244, 4 fo., 251, 4 fo., 255, 4 fo, in western div., 32 fo., .15	4.80	
3,012, 4 fo., 3,116, 4 fo., eastern div., 8 fo., .15	1.20	
125, 126, 137, 131, (2 in 137) 140, 140, (2 in 140) 144, 145, 147, 150, 155, 156, 158, 160, 162, 166, 45, 56, 66, 68, 69, 70, 74, 75, 76, 68, (2 in 68) 161 in central div., 4 fo., each 108 fo., .15	16.20	

No. 86.

Recording in final record, bench warrants & return in following numbered cases 188, 3 fo., 205, 4 fo., in western division 7 fo., .15	1.05	
153 in central div., 5 fo., .15	.75	
	44.85	
Allowed by accounting officers & paid	11 40	
		33.45
Forward		464.10
26 Brought forward		464.10

In the six months from Jan. 1 to June 30, 1889.

No. 87.

Docket, index, & taxing costs in following numbered causes: 3140 in eastern division 1.00

No. 88.

Filing præcipe for mittimus, .10 and issuing mittimus, 1.00 in cases No. 3107 & 3113, 1.10 in eastern division 2.20

No. 89.

Making copy of subpœna issued for witness in cause No. 170, central div., furnished to marshal, 2 fo ..... .20

No. 90.

Entering presentment, .30, filing indift, .10, filing testimony, .10, copy of indictment, .30, entering order for bench warrant, .15, and entering continuance, .15 in causes 193 & 194, 1.10 each 2.20
Entering presentment, .30, filing indict., .10, filing testimony, .10, copy of indictment, .80, entering order for bench warrant, .15, & entering continuance, .15 in cause No. 195 ..... 1.60

All in central division 3.80

No. 91.

Filing 193 vouchers accompanying duplicate accounts of W. M. Desmond U. S. marshal, approved by court, eastern division 19.30

No. 92.

Per diem for services five days in writing letters procuring names of persons to enter upon list of persons to serve as grand and .....

Forward 490.60
27 Brought forward 490.60

No. 92—Continued

Petit jurors & drawing jurors:
April term, 3 days 15.00
June term, 2 days 10.00 25.00

No. 93.

Making report to court per diem & mileage of grand jurors, petit jurors, & witnesses, as follows:
Petit jurors, April T., 8 fo., 15, 1.20; filing same, 10 ..... 1.30
Grand jurors, April T., 7 fo., 15, 1.50; filing same, 10 ..... 1.15
Witnesses, April T., 27 fo., 15, 4.05; filing same, 10 ..... 4.15
Grand jurors, June T., 6 fo., 15, 90; filing same, 10 ..... 1.00
Petit jurors, June T., 7 fo.. 15, 1.50; filing same, 10 ..... 1.15
Witnesses, June T., 8 fo., 15, 1.20; filing same, 10 ..... 1.30
Grand jurors, May T., 6 fo., 15, 90; filing same, 10 ..... 1.00
Petit jurors, May T., 6 fo., 15, 1.05; filing same, 10 ..... 1.15
Witnesses, May T., 9 fo., 15, 1.35; filing same, 10 ..... 1.45 13.65

No. 94.

Per diem for attendance at court of self & deputies, June T., at Dubuque, Ft. Dodge, & Sioux City 15.00
Allowed by accounting officers & paid 5.00 10.00

No. 95.

Filing 128 U. S. atty's discharge of witnesses at April, May, & June terms, 10. 12.80

No. 96.

Filing 179 Comsrs. U. S. court papers in cases returned by said commissioners missioners into court in causes where United States is party plaintiff, 10 .. 17.90

No. 97.

Docketing, index & taxing costs in the following numbered causes:
3085, 3159, 3162, 3164, 3165, 3167, 3170, 3171, in eastern division, 8 cases at 1.00 ..... 8.00
181, 188 central division, 2 cases at 1.00 ..... 2.00
283 western division, 1 case at 1.00 ..... 1.00
11.00

Forward 580.95
28 Brought forward 580.95

No. 98.

Seals to certificates attached to copies of orders of court approving accounts of U. S. marshal, U. S. attorney, U. S. clerk, & U. S. commissioners, 28 at 20 ..... 5.60

No. 99.

Seals to certificates attached to copies of orders of court for payment of grand jurors, petit jurors, & witnesses, 3 at 20 ..... .60

Total 587.15

In foregoing account where the court is not designated the services were performed in district court.

(Endorsed:) No. 3226. United States district court, northern district of Iowa. A. J. Van Duzee, clerk, vs. United States of America. Petition. Filed Oct. 25, 1889. A. J. Van Duzee, clerk.

29 And afterwards, to wit, on the 25th day of October, A. D., 1889, there was filed in the office of the clerk of said court, in said cause, an affidavit of service on Attorney-General, which affidavit is in words and figures as follows, to wit:

In U. S. district court, northern district of Iowa, eastern division.

A. J. VAN DUZEE
vs.
THE UNITED STATES OF AMERICA.

UNITED STATES OF AMERICA,
Northern District of Iowa:

A. J. Van Duzee, being duly sworn, says that on the 25th day of October, 1889, he enclosed in an envelope, securely sealed, a copy of the petition and bill of items in above cause, in above entitled cause, and deposited the same in the post-office at Dubuque, Iowa, directed the Attorney-General of the United States, Washington, D. C., postpaid, and duly registered.

A. J. VAN DUZEE.

Subscribed and sworn to before me this 25th day of October, A. D. 1889.

[SEAL.] ALFRED HOBBS,
U. S. Commissioner, Northern District of Iowa.

(Endorsed:) No. 3226. A. J. Van Duzee vs. United States of America. Affidavit of service of Attorney-General. Filed October 25th, A. D. 1889. A. J. Van Duzee, clerk.

30 And afterwards, to wit, on the 29th day of October, A. D. 1889, there was filed in the office of the clerk of said court, in said cause, proof of service upon United States attorney, which proof is in the words and figures following, to wit:

In U. S. district court, northern district of Iowa, eastern division.

A. J. VAN DUZEE
vs.
THE UNITED STATES OF AMERICA.

STATE OF IOWA,
Woodbury County, ss:

J. H. Bolton, of lawful age, being duly sworn on oath, says that on the 28th day of October, 1889, he personally delivered to T. P. Murphy, United States attorney for the northern district of Iowa, a copy of petition in above entitled cause, in Sioux City, in said district.

J. H. BOLTON.

Subscribed and sworn to by said J. H. Bolton, before me this 28th day of October, A. D. 1889.

[SEAL.] R. E. SACKETT, *Clerk.*

(Endorsed:) No. 3226. A. J. Van Duzee vs. United States of America. Proof of service upon U. S. attorney. Filed 29th day of October, 1889. A. J. Van Duzee, clerk.

31 And afterwards, to wit, on the 10th day of February, A. D. 1890, there was filed in the office of the clerk of said court demurrer in said cause, and duly submitted to the court, which said demurrer is in words and figures as follows, to wit:

In the district court of the United States, northern district of Iowa, eastern division.

A. J. VAN DUZEE
vs.
THE UNITED STATES.

DEMURRER.

Comes now the defendant in the above-entitled cause and demurs to the petition of plaintiff filed herein, and as cause therefor shows the following:

Said petition shows on its face that the plaintiff is not entitled to the relief demanded and in this:

1st. The services for which fees are charged and no allowance has been made are unwarranted and unauthorized by law, and the plaintiff in the discharge of his official duty was not required to render such services and

the same were not rendered at the instance or by the authority of any officer or agent of the defendant thereunto authorized and the same were unnecessary and superfluous. All of which is more fully and at large set forth as follows:

Account from July 1 to Dec. 31, 1885.

1. The first item claimed by the plaintiff is a disallowance of $17.50; a charge is made for filing each separate paper sent up from the U. S. commissioner's court. The plaintiff was entitled to one filing for each
32 final recognizance and one filing for all other papers in the case. The latter should be fastened together and filed as one paper. This will apply to all like disallowances set forth in plaintiff's petition.

2. The next item in plaintiff's account is for filing oaths of office of U. S. deputy marshals and for recording same, and service incident and necessary to the appointment and qualification of an officer should be borne by them, and for such service the defendant is not liable. This will apply to all like disallowances set out in plaintiff's petition.

3. The next item in plaintiff's account is for copy of indictment furnished prisoner at his request. This should be charged to the party interested. There is no provision in the U. S. fee bill for such charge; it is only in capital offenses that the U. S. furnishes the defendant a copy of the indictment free of costs. This will apply to all like disallowances in plaintiff's petition.

4. The next item in plaintiff's account is for making final entries in 28 cases, 1 folio, at 15 cents, being charged in each case. The charge for final entry in these accounts is predicated upon indorsement made upon the jacket containing the papers, *the papers*, or upon the back of some one of the papers enfolding the others in a case when the case is disposed of and the papers filed. If this endorsement is necessary to the proper filing of the papers, then the fee provided and paid for filing of said papers is the compensation for this work. If it is not necessary to the filing of the papers; then it would seem to be altogether unnecessary and superfluous and should not be paid for. The only clause in sec. 828 providing a fee for entering any step in a proceeding is the 8th clause; and it is clear
33 from the wording of that clause, the apposition of which the fee is provided, that no such service as this is contemplated under it; it was hardly contemplated that any endorsement on a jacket containing papers, or on any outer paper enfolding other papers, should be taken as the entering of any return, rule, order, continuance, judgment, decree, or recognizance. This will apply to all like disallowances in plaintiff's petition.

5. The next item in plaintiff's account is for $9.75 for entering marshal's return of subpœnas. It does not appear that plaintiff has entered these returns, and hence the same are suspended until it is made to appear that the returns have been entered. This will apply to all like disallowances is said petition.

6. The next item in plaintiff's account is for entering presentments of grand jury in 27 cases. In these cases the grand jury failed to indict, and the entering of presentment of grand jury and motion, rule, and order to dismiss are based on one order of one folio, reciting that 'whereas the

defendant had been held to bail to appear at court and the grand jury had failed to indict, the case (?) is ordered dismissed and the bondsmen released from further responsibility.' One entry of one folio should be allowed for the order discharging bondsmen, and all over disallowed." This will apply to all like disallowances in said petition.

7. The next item in plaintiff's account is for docketing, indexing, and taxing costs in nine cases, at $1.00 each. In these charges no indictment has been found nor information filed. Therefore there were no cases in the court and the docketing, etc., was without authority of law.
34 No docket fee is taxable in such instances. (See vol. 24, pages 401 and 658 of the Federal Reporter.) This will apply to all like disallowances in said petition.

Account from January 1 to June 30, 1886.

8. Charges for filing papers sent from commissioner's court. See paragraph 1.

9. Charges for making copies of indictments. See paragraph 3.

10. Charges for seals to copies of orders for marshal to pay witnesses and jurors. These charges were disallowed for the reason that the seals were not necessary and not required by the accounting officers in the adjustment of the marshal's accounts. The clerk and marshal, being required to attend each sitting of the court, are cognizant of its orders. Hence no seal is required to authenticate orders to them. The court, to exemplify its orders to its officers by its seal, is to exemplify them to itself. (Case of Singleton *vs.* U. S., vol. 22, page 118, Court of Claims Report; case Jones *vs.* U. S., vol. 39, page 410, Federal Reporter.

11. Entering marshal's returns. See paragraph 5.

12. Making final entries. See paragraph 4.

13. Entering continuances. See paragraph 5.

14. Entering presentment of grand jury and docketing, indexing, etc. See paragraphs 6 and 7.

Account from July 1 to December 31, 1886.

15. Charges for copies of indictments. See paragraph 3.

16. Making final entries. See paragraph 4.

17. Entering order of trial, verdict, etc., in 38 cases, were disallowed for the reason that it is part of the charge for docketing and indexing, or of the docket fee which provides for "making dockets and indexes,
35 issuing venires, taxing costs and all other services on the trial or argument of a cause."

Query. If the docket fee does not cover such services as entering order of trial, etc., and, in fact, all other services in a case, except issuing and filing papers, what does it cover?

18. The charges relative to the appointment and qualification of W. M. Desmond as U. S. marshal were disallowed for reasons set forth in paragraph 2.

19. The charges for entering returns of subpœnas for witnesses, bench warrants, presentment of grand jury, docketing in 8 cases and entering continuances. See paragraph 5.

Account from January 1 to June 30, 1887.

20. The charges relative to the appointment of a jury commissioner. See paragraph 2.

21. Remainder of this part of the account same as paragraph 5.

Account from July 1 to December 31, 1887.

22. Filing præcipes, etc., charges had been allowed for entering orders for same, and it is the duty of the clerk to issue such order.

23. In No. 2967 charge for docket fee, same as paragraph 7.

24. Item of $17.00 suspended that plaintiff may explain whether or not the defendants had been indicted. No explanation has been made.

25. Charges for seals. See paragraph 10.

26. Charges for præcipes for mittimuses were disallowed, for it was not apparent that a præcipe was necessary for a mittimus, as this writ does not issue upon a præcipe, but upon an order of the court.

27. As to remainder of claim see paragraph 5.

36 28. Making final entries. See paragraph 4.

29. $7.00 charged for docketing. See paragraph 7.

30. Charge for seals. See paragraph 10.

31. The next item claimed being for filing 10 marshals' accounts, etc., April term, 1888, for which he claims $14.20, was not rendered so. The way the same was presented in the account is as follows: "Filing 10 marshals' accounts, approved April term, 1888, $1.00; entering 10 orders approving same, 2 folios each, 20 folios at 15 cents, $3.00; 10 copies of said orders, 2 folios each, 20 folios, at 10 cents, $2.00; 10 certificates and seals to same, at 35 cents each, $3.50; total, $9.50." This amount was disallowed by the accounting officers on the ground that the United States were not liable. The clerk, in bring' suit, does not sue for the $9.50 disallowed, but claims $14.20, or $4.70 more than was disallowed or included in his account. In his account, the clerk did not include the "72 vouchers with said accounts, $7.20," but the same were left out entirely in the original account. On the other hand, the clerk does not sue for the $3.00 and 2.00 *me* mentioned above, but makes it $1.50 and $1.00, respectively. Hence, taking up the $7.20 more which he claims and deducting from it the $2.50, which he neglects to charge, we have the $4.70 excess as above.

32. Charge for copies of indictment. See paragraph 3.

33. Charges for seals to copy of order to draw a jury furnished the jury commissioner. This charge was also disallowed as not necessary. The jury commissioner, being an officer of the court, he comes under the ruling in the Singleton and Jones case, cited in paragraph 10.

34. Charges for entering returns. See paragraph 5.

37 35. Entering presentment of grand jury. See paragraph 6.

36. Charges for docketing, etc. See paragraph 7.

37. Charges for continuances. See paragraph 13.

Account from 1 to December 31, 1888.

38. The clerk is in error in regard to the first item as to docket fees. The amount that was disallowed was not $10.00 but $9.00, the error arising from the clerk including No. 3108 in his petition, when the same was not

disallowed in this item, but in another item. In the nine cases the docket fees were disallowed, as the indictments were ignored, but in No. 3108, the reason given for the disallowance was that there was no case at law. Simply a writ of attachment issued for a defaulting witness.

39. Charges for drawing bonds in excess of two folios were disallowed for the reason that they were excessive. The form prescribed by the Revised Code of Iowa, 1882, page 1053, does not exceed two hundred words.

40. Charges in regard to approval of accounts. See paragraph 2.

41. $2.50 for certificates and seals, to orders for marshal to pay witnesses and jurors. In this instance the certificate was allowed in each instance, as stated by the clerk, but the seals are not allowed for the reasons set forth in paragraph 10.

42. Charges for recording in final record the transcript from commissioners court, were disallowed for the reason that the transcript is no part of the case, which in the district court begins with the information or indictment, and ends with the judgment or verdict. The clerk is entitled to fees for making final record, but this does no include such as bail
38 bonds and justification of sureties taken before the commissioner, as these are proceedings of the commissioner and not of the court. Case of Jones *vs.* U. S., Vol. 39, page 410, Federal Reporter.

Account from January 1 to June 30, 1889.

43. Docket fee in case 3140. In this instance the cause was transferred from one division to another in the same district, and the fee of $1.00 was disallowed. The fee is to be paid on the final termination of the suit, and none accrues on a mere transfer from one division to another.

44. Charges for copies of subpœnas are prohibited by paragraph 5 of sec. 829, R. S.

T. P. MURPHY,
U. S. Attorney.

(Endorsed:) No. 3226. United States district court, northern district of Iowa. A. J. Van Duzee *vs.* The United States of America. Demurrer. Filed Feb. 10, 1890. A. J. Van Duzee, clerk. T. P. Murphy, U. S. Atty.

39 And on said 10th day of February, A. D. 1890, said demurrer was submitted to said court, as appears from the record entry of such submission entered in Minutes G, on page 627 of records of said court, as follows, to wit:

A. J. VAN DUZEE
vs.
THE UNITED STATES OF AMERICA. } No. 3226.

Now, this 10th day of February, A. D. 1890, this cause coming before the court, upon the demurrer to the petition herein filed this day, the defendant appearing by T. P. Murphy, esq., U. S. district attorney, and plaintiff appearing in person, said demurrer was duly submitted to the court and by the court taken under advisement.

40 And afterwards, on the sixth day of March, in the year of our Lord one thousand eight hundred and ninety, being the 38th day

of the November term of said court, the court—Shiras, judge—announced its decisions upon the demurrer of defendant and upon the items in plaintiff's account and its finding of the amount due thereon to plaintiff, all as contained in its written opinion filed on the same day, and which is in the words and figures following, viz:

In United States district court in and for northern district of Iowa, eastern division.

A. J. VAN DUZEE
vs.
THE UNITED STATES. } Law.

Petition to recover for service rendered by plaintiff as clerk of courts of the United States.—Demurrer to petition.

[A. J. Van Duzee, pro se. T. P. Murphy, U. S. district attorney, for defendant.]

SHIRAS, J.

The question presented by the demurrer to the petition filed in
41 the cause is as to the right of plaintiff to recover for certain service rendered by him as clerk of the United States courts in the northern district of Iowa.

The first division of the account sued on includes the fees charged in forty-five criminal cases for filing the papers certified up by the commissioners before whom the cases were commenced.

In the majority of the cases the number of papers filed by the clerk ranges from four to six; a few number eight papers, and one reaches sixteen. In the whole number of the forty-five cases there were filed two hundred and sixty-seven papers, or an average of five $\frac{14}{15}$ to each case.

It is admitted by defendant that for each paper properly filed the clerk is entitled to a fee of ten cents, and the question is whether the clerk should file all the papers certified up by the commissioners or should select out certain ones and file these only, or, to put the proposition in the language of counsel for defendant, "The plaintiff was entitled to one filing for each final recognizance and one filing for all other papers in the case; the latter should be fastened together and filed as one paper." This is the position taken by the accounting officials at Washington, and in accordance therewith they have allowed to plaintiff for the filing of two papers in each case. The statute gives a fee of ten cents for filing and entering every declaration plea or other paper. For every paper properly
42 filed the clerk is entitled to charge the named fee of ten cents.

When the papers in a case are received from the commissioner it is the duty of the clerk to file the same, and I can see no ground for holding that he should select out the final recognizance for filing, and then fasten together all the other papers and file the bundle as a single paper, thus making two papers in each case.

The important papers pertaining to cases brought before commissioners are the information, the warrant of arrest, and return thereon, the entry or evidence of the proceedings had before the commissioner including the order of committal, the recognizance entered into by the deft., if any, and the fee bill taxed up by the commissioner.

In given cases there may be other papers of moment which the commissioner should send up. When received by the clerk they are papers which he should file, and it is not his duty to select out one or more of such papers as specially important and file that, and then bundle the others together according to the contention on behalf of the defendant. It may be urged that the commissioners might send up a large number of papers which are wholly immaterial and that the clerk ought not to be paid for filing matters of this nature.

It is not the duty of the clerk to receive and file immeterial papers. When papers, however, which are properly sent to him in a given case are of such a nature that he should receive and file them, then he is
43 not under obligation to fasten all together and call them one paper, when in fact they are not. The information, warrant of arrest, the order made by the commissioner, the recognizance entered into by defendant, the fee bill, and other like matters were not parts of one paper before the commissioner, but were separate and distinct, and they remain so when sent to the clerk. He is under no obligation to fasten them together, and if, for convenience sake, he does so, there is no magic in a brass fastening or the venerable red tape which can convert these papers into one. There is no claim made that the several papers filed in the cases named in the first division of the account sued on were not in fact filed nor that they were not papers properly sent up by the commissioner. As I can see no legal foundation for the bundling theory advanced on behalf of defendant, the conclusion is that plaintiff is entitled to recover the statutory fee for filing the several papers in the account described.

The second division in the account is four dollars and fifty cents for filing the appointment of the several deputy marshals and recording their oaths of office. The objection urged thereto is "that any service incident and necessary to the appointment and qualification of an officer should be borne by him."

As between the United States and the party appointed to office it may be that such is the correct rule, but it does not follow that the United States can require the clerk to perform the service indicated, and then compel him to look to the officer for pay.

Is such, however, the rule between the United States and its appointees?
44 Do the judges, marshals, district attorneys, clerks, and other like officers pay the cost of the preparation and issuance of their commissions?

I do not understand such to be the practice of the Government.

The only way the clerk could recover pay for the services in question from the officer would be to refuse to file or record the papers until the fee was paid.

Has the clerk the right to refuse to file and record such papers when offered him until the proper fee therefor is paid? By so doing the interests of the Government and its citizens might be put in jeopardy, for thereby the public officers may be seriously delayed in the completion of their right to enter upon the discharge of the duties of their respective positions.

Again, if the matter of the recompense coming to the clerk for filing and recording commissioners' oaths of office and the like is a matter between the clerk and the officers, on the theory that such services do not come within the purview of the fee bill, then and by whom is the amount to be paid to be determined?

Suppose the clerk demands five dollars and the marshal offers one dollar, is the public business to be brought to a standstill until the question of the amount to be paid is judicially settled? This could not be tolerated for a moment. The filing and recording the necessary papers to complete the authority of the given officer to enter upon the duties of his position is work done in the interest of the public as well as in that of the officer, and the clerk has no right to interfere with the public business by re-
45 fusing to file and record the papers in question. It is his duty to file and record the same, a duty due the public, and the Government as the representative of the public should recompense him therefor.

If, as between the Government and the officer, the latter should pay such costs, the Government can deduct the same from the pay coming to the officer.

The next item is for furnishing a copy of an indictment to a defendant charged with selling liquor to Indians contrary to the statute, the sum charged being ninety cents.

The claim is that this should be charged to the party interested, and that it is only in capital cases that the U. S. furnishes the defendant a copy of the indictment free of costs.

Section 1033 of the Revised Statutes provides that in cases of treason a copy of the indictment, a list of the jury and of the witnesses shall be delivered to the defendant at least three days before the time of trial, and in the other capital cases such copy and list must be furnished at least two days before the trial.

The section does not deal with other classes of cases, and it certainly does not enact that defendants are not entitled to a copy of the indictment against them.

In article 6 of the amendments to the constitution it is provided that the accused "shall enjoy the right to a speedy and public trial ——— and to be informed of the nature and cause of the accusation."

How can a defendant be fully and properly informed of the
46 nature of a charge against him except by being furnished with a copy of the indictment?

Under the provisions of the Code of Iowa it is required that, upon arraignment, a copy of the indictment shall be furnished to the defendant in every case. The common practice prevailing in the State aids the court in determining in what mode the constitutional provision shall be carried out and the defendant be informed of the nature of the charge and the cause of accusation to which he is required to answer. Will it be questioned that when a defendant is charged with an offense which may be punished by imprisonment for years or for life, it is due to him that he be furnished with a copy of the indictment?

The constitutional provision already quoted is a law of higher authority than an enactment of Congress and it places the duty of carrying out its provisions upon the court.

If Congress should enact that a defendant should not have furnished to him a copy of the indictment, such enactment would not be binding upon the court, for the Constitution makes it the duty of the court to inform the defendant of the nature of the charge and cause of accusation against him, and it is the duty of the court to see that this constitutional provision is properly and fairly carried out. In what other mode can this be done in justice to the defendant, except by causing to be furnished to him a copy of the indictment, to which he is required to plead?

When the clerk in obedience to the order of the court, which in
47 turn is acting in obedience to the constitutional mandate, furnishes a copy of the indictment to the defendant, the same is furnished under the provisions of a law of the United States, and for work thus done, he is entitled to compensation.

The next item in plaintiff's account is for making final entries or records in twenty-eight cases, consisting of an entry made upon the jacket in which the papers are enclosed.

The entry thus made is a brief minute enabling one to ascertain at once the date of the disposition of the case, the pages of the fee book and record wherein will be found the proceedings taken in the case, and is more in the nature of an index than a record or final entry. I do not think these entries thus made, highly convenient as they are, can be brought within the provisions of the fee bill except under the head of indexes, and as such they are covered by the several charges therefor. To this item the demurrer is sustained.

The only objection made by defendant to the charge of $9.75 for entering marshal's returns of subpœnas is that it does not appear that the returns have been entered, but this objection is not well taken in fact.

The returns have been properly entered and no question, therefore, exists as to the right of the clerk to recover the amount charged therefor.

For the entries made of the return made by the grand jury in the several cases included in the sixth item, the plaintiff is entitled to the statutory folio fees, and no more, for the entry actually made, so
48 that plaintiff is not entitled to recover on this item.

The seventh item is for docketing, indexing, and taxing costs in nine case at $1.00 each. The fee bill provides that "for making dockets, indexes, taxing costs and other services in a cause which is dismissed or discontinued, one dollar."

The cases embraced in this item of the account were brought before commissioners, the defendants held to appear, but the grand jury ignored the same and hence the same were dismissed. The contention of the defendant is that these were not cases within the meaning of the statute. When the information was filed before the commissioner and the defendant was arrested and brought before him for hearing, the proceeding was a judicial proceeding with adversary parties. Section 847 of the Revised Statutes enacts that the commissioner shall receive "For hearing and deciding upon the case of any person charged with any crime or offense, five dollars a day for the time necessarily employed."

If the proceeding before the commissioner is a case within the meaning of section 847, how does it cease to be a case when it is sent up to the court?

The proceeding is one wherein the Government charges the defendant with the commission of an offense againt the laws of the United States.

The grand jury is one branch of the court, and when the cases are being investigated before it the court is dealing with the cases through the grand jury just as it does when the case is submitted to a trial jury.

If the grand jury finds an indictment then the court proceeds to
49 the trial of the accused. If the grand jury ignores the matter, the court may continue the case for further examination before another grand jury, or it may dismiss the case and order the discharge of the party if in custody, or the release of his bond if he is out on bail.

From the initiation of the proceeding before the commissioner until its final termination by a trial before the petit jury, or until its dismissal by the court for any reason, the proceeding is a case brought within both the letter and spirit of the statute, and hence the clerk is entitled to the dollar charged in each case.

The next question raised by the demurrer is to the charge for the seal affixed to the copies of orders for payment by the marshal of the sums due jurors and witnesses. These charges are contested upon the theory that "the seals are not necessary and not required by the accounting officers in the adjustment of the marshal's accounts; the clerk and marshal, being required to attend each sitting of the court, are cognizant of its orders; hence, no seal is required to authenticate orders to them. The court to exemplify its orders to its officers, by its seal, is to exemplify them to itself."

If this reasoning be good, then it is not necessary for the marshal to have furnished him a copy of the order. Being an officer of the court and therefore cognizant of its orders, he can say, "I heard the order made by the court for the payment of the witnesses and jurors and rely upon
50 the knowledge thus acquired." Would the accounting officers at Washington pass the marshal's accounts, showing the payment of thousands of dollars to witnesses and jurors upon the statement by the marshal that as an officer of court he was present at its sittings, heard the order made, and therefore knew that he was authorized to pay out the sums named?

Section 855 requires the court to enter on its minutes an order for the payment to witnesses and jurors of the fees due them, and this order is the authority of the marshal for the payment of the sums therein set forth.

An accounting officer who would allow the marshal for amounts claimed to have been paid to witnesses and jurors upon his bare statement that he had heard the court make the order of payment would be derelict in his duty, and I do not believe a marshal's account has ever been allowed unless it has been accompanied with evidence that the court had made the order required by section 855. What is the evidence of such order except a copy thereof duly certified to by the clerk with the proper seal attached?

The copy, to be of value, must be duly certified to, and the usual and proper form is to attest the correctness thereof by the signature of the clerk with the seal attached. An examination of the presented forms furnished to the marshal will show that there is appended thereto the usual form of certificate referring to the seal as attached.

Therefore when a copy of the order directing the payment of witnesses and jurors is furnished to the marshal, it should be so authenticated as to be evidence to him and also for him as need may arise, of the order as it

stands upon the records of the court, and this can only be done by
51 having the copy duly certified by the clerk with the seal attached.

Exception is also taken to the 17 item in the account, which is for the folio fees for entering order of trial and verdict in thirty-eight cases, the claim being that such services are included in the fee allowed "for making dockets, indexes, issuing venires, taxing costs, and all other services on the trial or argument of a cause." Is the entry of an order for trial or the recording the verdict services rendered on the trial or argument of a cause?

The order for trial precedes the trial, and may be entered many days before the trial itself is begun, for, until the jury is sworn, the trial proper has not been entered upon.

For the entry at large upon the records of the court of the verdict returned by the jury, the clerk is entitled to the proper folio fees allowed for making a record.

The next item objected to is the fee of ten cents charged for filing præcipes for bench warrants by the district attorney, the ground of exception being that the court had already ordered the issuance of the bench warrants, and hence a præcipe was unnecessary.

The practice is, upon the return of the indictment, for the district attorney to move the court for the issuance of a bench warrant, and for an order fixing the bail to be given.

The order made by the court, however, is not intended to be at once obeyed by the clerk, but simply to enable the district attorney to cause the issuance of the warrant of arrest when it becomes necessary. In many cases the defendant appears. Should it be made known to the court
52 that the clerk issued the bench warrants without awaiting the orders of the district attorney, he could be admonished that such was not the proper course to pursue, and would be instructed to await the order of the district attorney. When, in a given case, the issuance of a bench warrant is desired the district attorney directs it to be done by filing a præcipe, and in obedience thereto the clerk issues the warrant.

The filing the præcipe is in accordance with the settled practice of the court, and the clerk is therefore justified in filing the præcipe and making the proper charge therefor.

The same rule applies to the charge for the præcipe filed for the issuing mittimuses for the committal of defendants who have been sentenced to pay given fines and be committed till paid.

The collection of these fines is under the control of the district attorney and it is for him to determine when the exigency of a particular case requires the committal of the defendant and the issuance of the mittimus for that purpose.

In the issuance thereof the clerk obeys the direction of the district attorney, and the proper mode is for the district attorney to file a præcipe when the issuance of the writ is desired.

The exception to the forty-second item presents the question of what should be entered by the clerk in making the final record in a case, the contention of the defendant being that the final record should not embrace any of the proceedings before the commissioner.

It is required by the court that the commissioners shall send up in each case a brief return showing the steps taken in the case before them, and the conclusion reached therein.

53 The court is charged with the duty of examining the accounts of the commissioners for services rendered in all cases before them, and the return or order thus required is a means for securing correct accounts from them.

In the absence of any statutory provision touching the matter to be embraced in the final record, the court has adopted a rule upon the subject providing that in all criminal cases, unless otherwise specially ordered, the final record shall include the order made by the commissioner binding the defendant to appear before the grand jury, the indictment, the presentment thereof, the bench warrant if any and return thereon, the plea of the defendant, the verdict of the jury, and the final orders and sentence of the court thereon.

In carrying out this rule of court the clerk has entered the brief return of the commissioner which shows the order committing the defendant, and the ground taken that there is no case in court until the indictment is found is not well taken.

The rule of court above referred to governs the clerk in making the final record in criminal cases, and for services rendered in accordance therewith the clerk is entitled to compensation.

The exception to the docket fee of $1.00, charged in case No. 3140, removed for trial from one division of the district to another, is sustained. The case has not been discontinued nor dismissed. When it is terminated the proper docket will then be chargeable.

54 The last exception is for the fee charged for making copies of subpœnas furnished to the marshal to be left with the witnesses when they are summoned, it being claimed that paragraph five of section 829 of the Revised Statutes forbids such charge.

This paragraph fixes the fee payable to the marshal for service of a subpœna and forbides the marshal from making a further charge for copy, summons, or notice to a witness.

The section has reference solely to the fees of the marshal and does not deal with the fees due the clerk.

That a copy of the subpœna should be left with a witness will not be questioned.

It is a standing rule of this court that the clerk, in issuing subpœnas in criminal cases, shall make copies thereof to be left with the witnesses.

This rule was adopted by the court to insure prompt and proper service of subpœnas. The marshal receives nothing for serving the copy and the inhibition found in paragraph five of section 829 is observed. The clerk is bound by the rule of the court to make these copies. The services are within the line of his duty and no reason is perceived why he is not entitled to compensation therefor.

There is, it seems to me, a fundamental error in the view taken of this line of question by the accounting officers of the Department, and that is the assumption that there is no legal basis for allowing compensation to the clerks, unless some section of the Revised Statutes or of the Statutes at Large specially requires the work to be done.

55 It will not be denied that the court has full power and right to adopt rules regulating the *the* proceedure of the court in criminal cases. When the court in the exercises of this undoubted right adopts rules requiring the clerk to furnish copies of indictments, copies of subpœnas, to include certain matters in the final record and other like re-

quirements, the legal duty and obligation of the clerk to perform such services is as well established as though such rules formed part of the Revised Statutes. If the work thus done in obedience to the rule of court falls within the character of services for which the fee bill allows compensation, the clerk is legally entitled to the statutory compensation therefor.

The foregoing opinion covers all the questions of law presentee by the demurrer, and it not being questioned that the services were in fact rendered it follows that plaintiff is entitled to recover for items Nos. 1 to 3, inclusive; 5–7, to 16, inclusive; 18 to 21, inclusive; 23–24, 26 to 33, inclusive; 35 to 42, inclusive; 44, 45–47 to 52, inclusive; 54–55, 57 to 77, inclusive, and 79 to 99, inclusive, amounting in all to $516.15, and is not entitled to recover for Nos. 4–6–17, 22–25–34–43–46, 53, 56, and 78.

(Endorsed:) Filed March 6, 1890. A. J. Van Duzee, clerk.

56 And afterwards upon the 6th day of March, A. D., 1890, the same being the 38th day of the November Term, A. D., 1889, of said court, judgment upon demurrer in said cause, was entered by said district court, which judgment is in the words and figures following, as appears upon the Minutes G. on page 637, of the records of said court, to-wit:

A. J. VAN DUZEE
vs.
THE UNITED STATES OF AMERICA. } No. 3226.

Now, on this 6th day of March, A. D., 1890, the foregoing entitled cause coming before the court upon demurrer to the petition herein heretofore submitted to the court, and the court being now fully advised in the premises, does overrule said demurrer in part and sustains the same in part, and defendant electing to stand upon its demurrer:

It is ordered and adjudged that plaintiff, A. J. Van Duzee, do have and recover of and from the defendant, the United States of America, the sum of five hundred and sixteen and $\frac{15}{100}$ dollars ($516.15 found due him by the court, and the costs of this proceeding taxed at .

Defendant excepts to the ruling on the demurrer and the judgment therein.

57 And afterwards, to wit, on the 31st day of July, A. D. 1890, there was filed in the office of the clerk of said court an application for an order allowing an appeal to the Supreme Court in said cause, which application is in the words and figures following, to wit:

District court of the United States, northern district of Iowa, April term, 1890.

A. J. VAN DUZEE, PL'FF,
vs.
THE UNITED STATES OF AMERICA, DEF'T.

To said court:

Said defendant, by M. D. O'Connell, U. S. attorney of said district, as directed by the Attorney-General of the United States, hereby makes application for an order allowing an appeal by defendant to the Supreme

Court of the United States from the action of this court in said cause as follows:

1. From every decision which overruled the demurrer of defendant, and from every decision which overruled any part or paragraph thereof.

2. From every decision overruling objections of defendant made in said demurrer to the allowance of any item in plaintiff's account, and from every decision allowing said items in making up the sum found due the plaintiff.

3. From the finding and judgment of this court made and rendered March 6, 1890.

58 M. D. O'CONNELL,
U. S. Attorney.
By DE WITT C. CRAM,
Assistant.

(Endorsed:) No. 3226. District court U. S., N. D. of Iowa. A. J. Van Duzee, pl'ff, vs. The United States of America. Application of defendant for order of appeal. Filed July 31, 1890. A. J. Van Duzee, clerk.

Service hereof accepted this 31st day of July, 1890, at Dubuque, and it is agreed that this may be submitted without further notice. A. J. Van Duzee, plaintiff.

And afterwards, to wit, on the 4th day of August, the same being the 31st day of the regular April, A. D. 1890, term of said court, an order was made by said court upon said application for an order allowing appeal, which order is entered in minutes H, on page 141 of the records of said court, and is in the following words and figures, to wit:

A. J. VAN DUZEE
vs.
THE UNITED STATES OF AMERICA. } No. 3226.

Now, on this 4th day of August, A. D. 1890, this cause coming before the court upon application of defendant for an order allowing an appeal to the Supreme Court of the United States from the decisions and findings and judgment of this court in said cause, defendant appearing by De Witt C. Cram, esq., assistant U. S. attorney, and the court being fully advised in the premises, it is now ordered that said appeal as applied for be and the same is hereby allowed.

59 UNITED STATES OF AMERICA,
Northern District of Iowa, ss:

I, A. J. Van Duzee, clerk of the district court of the United States in and for the northern district of Iowa, do hereby certify that the foregoing is a full, true, and perfect transcript of the record, proceedings, and opinion of the court in the case of A. J. Van Duzee, plaintiff, against the United States of America, defendant, as fully as the same remain on file and of record in my office.

In witness whereof I have hereunto set my hand and affixed the seal of said court at Dubuque in said district, this 13th day of August, A. D. 1890.

[SEAL.] A. J. VAN DUZEE,
Clerk U. S. Court, Northern District of Iowa.

60 (Indorsed on cover:) No. 1244. The United States, appellant, vs. A. J. Van Duzee. N. Iowa, D. C. U. S. Filed August 21, 1890.

Office Supreme Court U. S.
FILED,
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JAMES H. McKENNEY,
CLERK.

In the Supreme Court of the United States.

OCTOBER TERM, 1890.

THE UNITED STATES, APPELLANT,
vs.
A. J. VAN DUZEE, APPELLEE. } No. 1244.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF IOWA.

SUBJECT: CLERK'S FEES.

APPELLANT'S BRIEF.

JOHN B. COTTON,
Assistant Attorney-General.
JOHN C. CHANEY,
Assistant Attorney.

In the Supreme Court of the United States.

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THE UNITED STATES, APPELLANT,
vs.
A. J. VAN DUZEE, APPELLEE. } No. 1244.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF IOWA.

APPELLANT'S BRIEF.

Appellee's full name is not set out in the record.

The dispute in this case is over the fees charged by appellee, as clerk of the district court of the United States for the northern district of Iowa and the action of the court in allowing items 1 to 3, inclusive, 5–7 to 16, inclusive, 18 to 21, inclusive, 23, 24, 26 to 33, inclusive, 35 to 42, inclusive, 44, 45–47 to 52, inclusive, 54, 55, 57 to 77, inclusive, 79 to 86, inclusive, and 88 to 99, inclusive, amounting in the aggregate to $516.15.

Items 4–6–17, 22–25–34, 43–46, 53, 56, and 87 are disallowed by the court.

The contention of appellant is, that the said court erred in its conclusions of law upon the facts found in relation to the respective items in appellee's demand, particularly in items 1, 2, 3, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 20, 23, 24, 26, 27, 28, 29, 30, 31, 35, 36, 37, 38, 39, 40, 44, 45, 47, 48, 49, 50, 51, 52, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 67, 68, 69, 70, 78, 79, 81, 83, 84, 85, 86, 88, 89, 90, 91, 92, 93, 95, 96, 97, 98, and 99, the details of which will now be considered.

Items 1, 12, and 96 embrace charges for filing papers received from commissioners of the United States circuit courts.

By the statute at section 828, subdivision 3 thereof, the clerk is entitled to a fee of 10 cents for filing and entering every declaration, plea, or other paper. Not simply for *filing*, it must include, also, *entering*—entering in his docket.

The Comptroller has allowed for the filing of two papers in each case.

This officer, perhaps, did even more than he was authorized to do in this allowance.

When matters come up from the commissioner, it should be remembered that all the commissioner did was to commit the party charged with crime to the action of the court.

If anything is necessary to be done by the clerk in regard to the papers sent in by the commissioner, it is to *receive* the same.

If he "file" them he shall simply mark thereon "Filed," date, with his name; *i. e.*, if there be any necessity for such

action. He does not proceed to docket the case. It is not yet a *case* in his court.

The accused has been committed by the commissioner to see if a case may not be found against him.

There is certainly no case as yet. Indeed, there may never be a case against the accused, for this depends upon the investigation to follow. It may be, and often is, the conclusion that no sufficient grounds appear to hold the accused amenable to the infraction of any law. Then why encumber the record with anything until an indictment is found, until a case is "made up" against the party committed by the commissioner? The *papers* sent up by the commissioner serve, simply, to inform the prosecutor and the grand jury that there is a matter for their investigation discovered by him. These papers are then passed over to the officers charged with such investigation. Can it add to the efficiency of the investigation by making a docket entry of a case in the formative state? Matters go into records in court for the consideration of the court. There is nothing in the papers sent in by the commissioner that can properly go into the court docket.

The indictment is the force which puts the court into action in a criminal case. The indictment is the beginning of the entry in the docket. If it be necessary to "enter" such matter in the clerk's docket, the individual papers will certainly not be entered. Why enter papers which can have no place in the case when the same shall be made up?

Instead of being helpful of results, it would necessarily be confusing.

If these papers must go into the docket, is not the docket fee, allowed by law, sufficient for them, and does it not include all such fees as this?

The clerk can not be allowed for "filing" alone, the allowance must be for "filing and entering." So that unless he does put it into the docket he has not done the work, required under the statute, for a fee of 10 cents.

When *cases* are brought directly in the court, the clerk "files and enters" papers therein, for which a fee is provided. This is vastly different from sending in to the clerk the papers upon which the commissioner acted. Such papers can not become a part of the manual record of the court, and if properly filed they can not be properly entered.

The fee allowed the clerk for "filing and entering" is for court cases.

It is submitted, therefore, that the fees in these items can not be allowed.

Items 2, 8, 9, 11, 13, 14, 27, 30, 37, 39, 83, 91, and 98 embrace charges for filing and recording appointments and oaths of marshals, oaths of bailiffs and court criers, filing orders of appointment of jury commissioners, certified copy of oath appointing jury commissioners, entering order of court approving accounts of officers (as at 83), filing vouchers accompanying duplicate accounts (as at 91), and seals to certificates attached to copies of orders of court approving accounts of the officers of the court (as at 98).

The expense of making civilians officers of the Government should be born by the beneficiaries, and the charges of items 2 to 39 above, being of this nature, should all be disallowed.

As to items 83, 91, and 98, this is not for any service rendered the Government.

They are matters in which the officers are chiefly interested. In dealings between man and man such charges would not be entertained; no one would think of charging his neighbor for stating his account against him. If the Government pays liberally for actual and necessary services rendered in its behalf it seems no more than fair that its servants should not also make a charge for making out their bill for services, but that this should not cost the Government anything. However see *Jones's Case* (39 Fed. R., 410).

In item 98 the *seal* was not necessary to the collection of the fees certified to.

There is a reasonableness about all righteous things, and in the absence of a statute authorizing such charges it is submitted they must be disallowed.

Items 3, 15, 24, and 61 embrace charges for making copies of indictments for the defendants in the cases in which the fees are alleged to have been earned.

The Comptroller disallowed these charges because, in his judgment, the defendants should pay for such copies themselves.

The lower court learnedly discusses the righteousness of these charges as a reason for their allowance. That court found no law authorizing such charges unless it be found authorized in the Constitution of the United States, wherein it is made fundamental that a party charged with a crime shall "enjoy a speedy trial and be entitled to have information of the nature of the accusation against him."

It is provided that in capital cases the accused shall be furnished with a copy of the indictment, and the very fact that capital cases are thus singled out should convince anyone that it is not intended that indictments shall be furnished defendants in other criminal cases. It was not thought that his right to a speedy trial would be jeopardized by a failure to furnish him a copy of the indictment in such cases, and it was not deemed important in such matters that he get his information as to the charge against him through a copy of the indictment.

It is not necessary to his information or privileges as a citizen that he have a copy of the indictment. When he comes into court to plead the charge will then be read to him.

But the lower court says if there were a statute against furnishing this copy it must be disregarded, for the Constitution makes it mandatory. But we do not read the Constitution as requiring such action upon the part of the Government, and there being no statutory enactment authorizing it it is submitted that the charges in said items must be disallowed.

Items 5, 18, 19, 21, 32, 33, 41, 42, 65, 66, 71, 72, 73, 74, 75, 76, 77, 80, 82, and 94 embraced charges which are probably legal in themselves, and the only question, doubtless, is as to whether the services charged for were actually rendered; at all events this is the chief reason for the action of the Comptroller upon this class of cases.

They were "held up" on account of the report made by the examiner of the Department of Justice stating that such services had not been rendered.

It is, therefore, a question of fact which has probably been settled by the findings of the court.

Item 6. The charges embraced in this item were disallowed by the court, as were also 4, 17, 22, 25, 34, 43, 46, 53, 56, and 87, and can not enter into dispute now.

Items 7, 23, 35, 44, 47, 57, 79, 81, and 97 embrace charges for dockets, index, and taxing costs. The cases occasioning these charges were originally before the commissioner. The defendants therein were bound over to the court to await the action of the grand jury.

The grand jury failed to return indictments and the matters were dismissed.

The Comptroller holds that these were not cases within the meaning of the law, and disallowed this class of items.

The lower court argues that these were cases before the commissioner, and did not cease to be cases when they reached the court. It is submitted that the Comptroller is right; that these are perhaps "cases" before the commissioner, but they never were cases before the court. They could only be cases upon indictments, and there being no indictments there certainly was no "case," as the term in the act implies, and means in either of the matters before the commissioner.

The very essence of the commissioner's duties is to bind the party over to enable the court and the grand jury to determine if there be a case against him. Until there is a case there is, or can be, no docketing of a case. The matters never materialized. They died in the formative state.

Item 10 embraces charges for filing testimony taken by the grand jury.

This item seems not to have been presented to the Comptroller, and therefor did not have his action thereon.

It is submitted that there is no statutory authority for this charge, and it is certainly unprecedented that the grand jury should take down the testimony offered before it, and that the court should allow such information to be filed with the clerk to become a public document subject to the inspection of anyone other than the prosecuting officers.

This item should be disallowed.

Items 16, 38, 59, 62, 63, 64, 84, 85 in part, and 99 embrace charges for the use of the seal of the court to copy of orders to the marshal to pay witnesses (as at 16 and 59), to orders of court for the drawing of juries (as at 38 and 62), to copy of orders to marshals to pay jurors (as at 84 and 99), and to copy of order to appoint jury commissioners, 85.

These officers are members of the court and certified copies of orders of the court bearing the seal are unnecessary for their information or for disbursement of the funds. The charges are unauthorized.

Singleton vs. *United States* (22 C. Cls. R., 118).
Jones vs. *United States* (39 Fed. R., 410).

Items 20, 36, 58, and 93 appear to be in form and substance within the statutory authorization, and it is submitted if the charges embraced therein under the court's findings should not be allowed.

Item 26 embraces charges for entering order of trial and verdict in certain cases.

It is submitted that, under section 828, subdivision 12

thereof, these charges are fully covered by the allowance for docketing, indexing, etc., and the clerk having received his fees for such services he can not sustain a charge for individual portions of these docket fees.

Item 28 embraces charges for drawing report of drawing of juries.

This is a duty devolving upon the jury commissioner, not upon the clerk, and his charges herein are unauthorized and illegal.

Items 29, 40, and 51 embrace charges for filing jury venires and returns of marshals thereon.

There is no authority for this.

Section 828, Revised Statutes, United States, positively prohibits the charge for issuing and entering a writ of venire.

Item 31. Making report to Commissioner of Internal Revenue.

It is contended that appellee is amply paid for this service, and that he is paid by the fees received through the provision made in subdivision 17 of section 828 of the Revised Statutes, United States, which says:

> For receiving, keeping, and paying out money, in pursuance of any statute or order of the court, 1 per centum on the amount so received, kept, and paid.

His report to the Commissioner of Internal Revenue accompanying moneys collected by him is but one of the incidents of this service and ought not to constitute a distinct charge.

Item 45. Filing præcipes for bench warrant. These warrants are issued upon the *orders* of the court, not on the præcipe.

For these "orders" the clerk has been paid, and to pay for the præcipe also would be paying two fees for the same service.

This item should not be allowed.

Likewise in—

Item 49. Filing præcipes for mittimus, etc. Writs of this character issue upon the "order" of the court, not on the præcipe, and the same reason exists for disallowance of this item as to that of No. 45 next above.

Items 50 and 54. Recording reports of drawing of juries and entering continuances, respectively, embrace excessive charges for the alleged services as held by the Comptroller, and his action was founded on the report of the Examiner of the Department of Justice disputing the folios charged for.

The findings of the court, although indistinct, is that the services charged for were actually rendered, and these charges must probably be allowed.

Item 52. Entering return of marshal of subpœnas for witnesses. It is submitted that section 828, R. S. U. S., does not allow these charges.

Item 60. Filing marshal's accounts, vouchers accompanying such accounts, recording orders of the court approving said accounts, making copies of said orders, together with certificate and seal.

The action of the Comptroller upon these charges is seen under No. 31, at page 21 of the Record. The account as herein presented is not as made up for the action of the Comptroller.

It will be contended, however, that it is making bad matters worse to charge up the rendering of accounts to

the Government, and then the filing of each separate voucher in an account.

Admitting, for the sake of the argument, that the accounts are properly filed and charged for, it is, indeed, questionable if the vouchers which make up the accounts should also be charged for. When it comes to this expenses are becoming burdens.

What has been said under items 2 to 98 is applicable to these charges, and by this "faith" it is contended these charges should be disallowed *in toto*.

However, see *Jones* vs. *United States* (39 Fed. R., 410).

Items 67, 68, 69, 70, 85, in part, and 86, recording in final record motion and affidavits for order of court for subpœnas for witnesses for defendant, bench warrants, bail bonds, transcripts from commissioners, etc.

The last, first—

The transcript is no part of the case, and should not enter into the clerk's record of the case. The commissioner is required to send up a brief return showing the steps taken in the case before him, and the conclusion reached by him, simply advisory and nothing more. It is not for record that it is sent up, and should not be recorded at all.

The case, it must be insisted, begins with the indictment and ends with judgment and verdict.

Final records do not include bench warrants, according to *Jones* vs. *United States* (39 Fed. R., 410). And if any or all of the papers charged for here are necessarily and properly recorded, are they not paid for in allowances made the clerk in docket fees and the like?

At all events it is insisted that only such papers as come into the case from the indictment up to the final disposition of the case are properly matters for the clerk's record.

The charge for the seal in item 85 must be disallowed as unnecessary, under authority in the Singleton case, 22 C. Cls., 118.

Again——

There is no law requiring the "final record" to be made in criminal cases.

There is no law of the United States requiring the proceedings in criminal cases in the United States courts to conform to the practice established in criminal cases in the State courts.

Section 914 directs that the State laws shall be followed in certain particulars in civil causes.

Section 1014 mentions certain State laws as to matters of examination preceding trials in criminal matters, but at no other stage of the matter and under no other circumstances. Hence the charges anent such matters in State courts can not control in United States practice.

Judgments of the lower court, based on such relation, are wrongly founded and are erroneous.

Item 89. Making copy of subpœna issued for witnesses. This is the province of the marshal, and by section 829, Revised Statutes, United States, it is provided that, "For serving a writ of subpœna on a witness, 50 cents; and no further compensation shall be allowed for any copy, summons, or notice for a witness," and the court can not bind the Government to pay for such fee to the clerk upon its order.

The statute provides that the marshal may furnish the witness with a copy of the subpœna, but it prohibits a charge therefor. It is insisted that he shall continue to do his duty.

It would appear, therefore, that this charge is illegal and must be disallowed.

Items 92 and 95:

Item "92" embraces charges for per diems in writing letters in the procuration of names of persons to enter upon list of persons to serve as grand and petit jurors—3 days April term, 2 days June term, 1889.

Item "95" is for filing 128 U. S. attorney's discharges of witnesses, at April, May, and June term, 1889.

There is certainly no reason for these charges, and they are not authorized by any law.

The right of the clerk to compensation and that for which he should be compensated is set forth in section 828 of the Revised Statutes of the United States.

The relations of the clerk to the Government so far as his services are concerned are the same as he sustains to an individual litigant in the court with respect to the compensation provided for in said section.

Statutory authority must be the guide in determining appellee's rights, and likewise appellant's obligations. It has been the guide all these years, and must be the guide now.

The intent of the statute prescribing duties and providing for their compensation is that the clerk shall have pay for every necessary service required of him, but it can not be thought to be the law that he shall needlessly and without excuse multiply opportunities to make charges for

services of doubtful necessity, or that he shall charge for the performance of duties required of other officers of the Government.

It is a perversion of the statute to turn it from an honest disposition to reward the "laborer for worthy hire" to that of a studied scheme to "make out of it all he can."

Each item of the account must have the scrutiny of the court, and they have been grouped in the brief into classes as best they could be for the convenience of such investigation and the court's consideration.

Several of the items have somewhat of an irregular standing in the case, notably items 10 and 28 to 31, inclusive, do not appear to have been submitted to the Comptroller. In fact but 43 items appear to have been considered by the Comptroller. These items appear in appellant's demurrer in the court below, and the court's consideration and opinion was confined to the items treated by the Comptroller.

But for the casual statement in the court's opinion, at page 30 of the record, there would be nothing to show that any other items than those before the Comptroller were before the court for consideration.

It is respectfully submitted that the line of action suggested above is in keeping with the reasonableness of the matter, and is therefore offered for consideration.

JOHN B. COTTON,
Assistant Attorney-General.
JOHN C. CHANEY,
Assistant Attorney.

FEBRUARY 25, 1891.

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BRIEF AND ARGUMENT

ON BEHALF OF DEFENDANT IN ERROR.

SUPREME COURT OF THE UNITED STATES

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APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF IOWA.

THE CASE.

This action was brought in the District Court by the appellant, for the purpose of recovering judgment for certain fees earned by him as Clerk of the United States Courts for the Northern District of Iowa, but which had been disallowed him by the accounting officers at Washington.

In the account attached to the petition as an exhibit, the fees sued for are grouped together under ninety-nine different heads.

It was held by the District Court that appellee was not entitled to recover for the fees included under Nos. 4, 6, 17, 22, 25, 34, 46, 53, 56, and 78, but was entitled to recover the remainder amounting to $516.15.

It will be noticed that in the account the fees earned during each six months beginning with July 1st, 1885, are set forth separately, thus necessitating the large number of groups into which the account is divided.

The ruling and decision upon one item, therefore, will dispose of many other items in the account, and it is now proposed to bring together by the numbers, the items that depend upon the one ruling and to give such an explanation thereof, as will aid the court in understanding the nature of the charge made and the objections thereto.

ITEMS No. 1–12–96.

Filing papers received from commissioner, $17.50.

The charge in original account presented to the Treasury Department, was for items in No. 1, $26.70. The accounting officers suspended the whole amount for explanation as to papers filed (Statement No. 95009.) Upon explanation in which the clerk reclaimed for full amount for reasons hereafter stated, an allowance was made for two (2) filings in each case, $9 20, leaving balance unpaid, $17.50.

SECTION 828. R. S. U. S., paragraph 3, provided clearly :—"For filing and entering every declaration, plea, or other paper, ten cents," all the papers filed were those returned into the Clerk's office as provided in Section 1014, R. S. U. S., the Information, Warrant, Subpœna, Testimony, Report of Action of Commissioner and Bail Bond, and occassionally other papers pertaining to the case.

Similar charges have been made in accounts rendered by the defendant in error each six months since January 30, 1886, and accounting officers have allowed such charges and same have been paid.

And under the designation of "other papers," it is claimed there is authority for the charge, the papers in each case being those admitted by plaintiff in error to be material and connected with the cases in which they were filed. There is no law or precedent requiring the clerk to fasten the papers together and file as one. Reed vs. U. S., Ct. Cl. No. 14, 980 (decided 1888,) Goodrich vs. U. S., 35 Fed. Rp., 193; Erwin vs. U. S., 37 Fed. Rep., 480; Jones vs. U. S., 39 Fed. Rep., 410.

ITEMS 2–11–27.

Filing and recording connected with appointment, oaths and recording and qualifying District Attorney, Assistant District and Marshal and Deputy Marshals.

Section 780, R. S. U. S., provided for appointment Deputy Marshals.

Section 782, R. S. U. S., provided for Bond of Marshal, filing and rendering same.

Section 789, R. S. U. S., provides that Deputy Marshals in case of death of Marshal, shall continue in office, etc.

Section 759, R. S. U. S., requires the District Attorney to be sworn to a faithful execution thereof.

Section 1756, R. S. U. S., requires all persons appointed to any office of trust or profit, to subscribe to an oath the form of which is provided in that section.

Section 1759, R. S. U. S., provides for the custody of the oath provided in Section 1756.

What is to be done with the appointments and oaths of the parties appointed to fill the offices aforesaid? As to some of them the statutes are silent. The court in this district has adopted the practice of requiring these papers to be filed and recorded by the clerk. In obedience to this practice the clerk has performed the work included in items 2, 11 and 27.

ITEMS 3-15-24-61.

For copies of Indictments.

These copies were made as ordered by the Court. See opinion in this record. Rule adopted by the court is

"The clerk shall, when demanded, furnish a copy of the Indictment or information to each defendant or his counsel."

ITEMS 5-18-19-21-32-33-41-42-52-71-74-75-77.

Entering Returns, Subpœnas, Bench Warrants and Mittimus.

The charges covered by all said items are for entering Returns, of Subpœnas, Bench Warrants and Mittimus, some of which had not been made in proper place, and so found by Special Examiner of Department of Justice, and the sums paid by the United States for such entries, was on recommendation of said examiner, charged to defendant in error until the enteries were made and deducted from a subsequent account found due defendant in error. The entries were subsequently properly made in a book, the form for which was furnished to defendant in error, by said special examiner, and claim made for payment of such sum as had been retained as aforesaid but same was never allowed by accounting officers.

The plaintiff in error claimed in demurer that:—"It does not appear that plaintiff has entered these returns and hence the same are suspended until it is made to appear that the returns have been entered."

Defendant in error states that March 2, 1889, he mailed to Hon. A. H. Garland, U. S. Attorney General, a full statement of claim of these and other fees, and stating that these entries were made and upon the showing so made in the letter of March 2, 1889, part of fees so reclaimed were allowed and paid but not those herein mentioned.

ITEMS 7-23-35-44-47-57-79-81-87-97.

D. I. and T. costs in causes dismissed.

These charges are for Dockets, Indexes and Taxing costs in cases that originated before the U. S. Commissioner; were filed by commissioner with the clerk as required under Section 1014, R. S.; were duly

docketed, placed on Court Calendar, submitted to Grand Jury, who returned report of No Bill, and the cases upon motion of U. S. Attorney were dismissed by the court and order entered by the court discharging bond. Contention of accounting officers is that these are not "cases."

Section 847, R. S., provides that the commissioner shall receive "For hearing and deciding upon the case." etc., "If the proceedings before the commissioner is a case within the meaning of the Section 847, how does it cease to be a case when it is sent up to the court? VanDuzee vs. U. S. Fed. Rep.

Section 4289, Code of Iowa, 1882: "If upon investigation the Grand Jury refuses to find an indictment, it shall return all of said papers to the court, with an indictment. it shall return all of said papers to the court, with an endorsement thereon signed by the foreman to the effect that the charge is dismissed, and thereupon the court must order the discharge of the defendant from custody, if in jail, or the exoneration of the bail."

The item 81, covering case 3108 is referred to in demurrer. This is a case in which an order was made for attachment for contempt of court, the cause was regularly docketed, put upon the calendar, and disposed of as other causes and was clearly a case against the defendant, certainly it could not be interloped into the original case against another defendant. Erwin vs. U. S., Fed. Rep., 479 and cases cited.

ITEMS 8-39.

Oath to bailiffs.

The oaths were administered to all the bailiffs, including the one having charge of Grand Jury, as no particular bailiffs were designated to take charge of Petit or Grand Jurors, and any one of them might be called upon for such purpose. There can be no question but that to the bailiff having charge of Jury the usual oath should be administered. Should the oath be administered to bailiff each time he goes out in charge of a Jury, or is it not the better practice to administer oath to each bailiff, then each one is ready to perform any duty to which he may be called. See Section 715, R. S.

ITEM 30.

Appointment of crier.

There is an error in printing record and recording order appointing crier Oct. T. should be 15.

The practice of the court has been to appoint a crier at each term of the court, and clerk has simply recorded the order as directed by the court, the question is, was it a proper proceeding on part of the court. if so, should not the clerk be paid for entering the orders?

ITEMS 9-13-14-37-63-38-62-85.

Filing and recording order connected with appointment of jury commissioners. Making certified copies for commissioners, certificates and seals.

The practice has always been in this district, with one exception, for the court to make an order appointing a jury commissioner to assist in procuring names and drawing juries for each term and the commission or notice to such person or such designation has been, by the clerk serving upon such person, a certified copy of the order.

The direction to the clerk has been in writing signed by the judge, directing the clerk to enter such order, the same being generally done in vacation. This written direction to the clerk has been filed by the clerk, and the charge is for filing such paper, and making certified copy of order as entered.

To give force to the copy of order furnished to jury commissioner it is the duty of clerk to certify that same is a copy and attach the seal of the court.

ITEM 10.

Filing testimony taken before Grand Jury.

Section 4293, code of Iowa, 1882, provides that "the minutes of the evidence of each witness (witnesses before Grand Jury) must be presented with the indictment to the court, and filed by the clerk of the court and remain in his office as a record."

This practice has been pursued in this district, and in but few instances has the accounting officer refused payment to the clerk for such filing, and have upon explanation allowed and paid such suspensions except in this instance.

ITEMS 16–48–59–64–84–99.

Certificates and seals to copy of orders of court to marshal to pay witnesses and jurors.

The law clearly requires an order to be entered of record before the marshal shall be entitled to be reimbursed for his payments to jurors and witnesses. See 855 R. S.

How are the accounting officers to be informed that such order has been entered? Will they accept the marshal's statement in form of a letter? Will they accept a simple copy of the order without a certificate of the clerk that same is a copy? Any one could draw up what purports to be a copy of an order. All the *forms provided by the departments* to the marshals, *in cases when a certificate of the clerk* to copy of an order is required, provides for a seal, viz:

"Witness my hand and seal of said court this day of.....

.....Clerk."

This is in the nature of a regulation of the Department of Justice, requiring the clerk to attach seal of the court.

Nos. 20–36–54–76–80.

Entry continuances.

These continuances were entered on record under one general heading, and the cases designated by number, title and brief description of crime.

Paragraph 8 of sec. 828 R. S. provides a fee of fifteen cents for entering any continuance. The form is not prescribed. The continuances charged for were also entered in a fee-book and appearance docket under the title of each case. These entries were satisfactory to the court on signing the record, and operated as a continuance of the cases named.

The accounting officers only allow for the whole entry, which covers many cases, by the folio, counting from beginning to end, and nothing for entry in fee-book or appearance docket. See Item 5, etc.

No. 26.

Entering order for trial and verdict.

The accounting officers claim these services charged for are covered by docket, index and taxing costs. Such claim has long been abandoned, and this is the only instance in which the claim as above has been made.

ITEM 28.

Writing report of drawing juries.

ITEMS 29–40–51–66.

Filing venire and recording returns of same.

ITEMS 38–62–85.

Certificates and seals to copies of orders directing jury commissioners and clerk to draw juries furnished to commissioner.

ITEMS 50–65.

Recording reports of jury commissioners of drawing juries.

ITEM 93.

Making report to court per diem and mileage of grand jurors, petit jurors and witnesses.

The service charged for in all these items are of the nature that appeals to the discretion of the court in determing what is best in practice for the orderly and intelligent proceedings in conducting the business of the court.

The clerk, by his connection with the court, is called upon to draw this report of the action of the jury commissioners. Should he not either be paid for such service, or be paid a per diem same as jury commissioner?

The accounting officers contend that filing venires and entering return is covered by dockets, index and taxing costs. See sec. 828 R. S. provides:—

"For making dockets and indexes, *issuing* venire, taxing costs, and all other services on the trial or argument of a cause."

This filing and recording returns of venire is precedent to the empaneling of grand jury and petit jury. Under the practice in this district the calling of the names of jurymen to determine if those served with the summons to serve as jurymen for the term are in attendance, and all charged for, is done and concluded before any cause is called for trial, except report of per diem and mileage. The jurymen are drawn and summoned for *the term*, and as there are a number of items connected with jury, I will here give an outline of the practice under rules of court, subsequent to the order of the court directing juries to be drawn and summoned.

The rules were adopted by Judge McCrary of Circuit Court and adopted by District Court, and practice has been in this district, as a saving of expense, to summon only one jury to serve in both courts.

The rules provide that the jury commissioner and clerk shall procure and put in the jury box not less than 400 names of persons suitable for jurors and residing in the various counties in the division where the court is held (Three Divisions in this District); that they shall draw out alternately a name until 300 have been taken from the

box; that such 300 names shall be placed in the box, and from these the grand jury and petit jury shall be drawn for the term. The persons so drawn are summoned in obedience to venire. The jury commissioner and clerk then report to the court such drawing, and such report is recorded. On the day the venire is returnable the same is returned into court and filed by the clerk and the return of the marshal recorded. The court directs the clerk to call the names of the grand jury, and they are empaneled and a record made of such empaneling. The petit jury are called, and such as answer are designated as jurymen for the term, and a record is made in accordance thereunto.

The services charged have nothing to do with trial or argument of a cause and have no connection with any cause, and there may not be a cause tried to such jury during the term.

Fee bill provides fee of ten cents for filing any paper to be preserved and pertaining to the proceedings in the court, and no prohibition as to fee for *filing* venire returned by marshal.

It is made the duty of the court, sec. 855 R. S., to enter an order on its minutes for the payment of the per diem and mileage due to each witness and juror. How shall the court be informed as to per diem and mileage? All these facts are in the possession of the clerk, in the various records. Unless the facts are brought together and presented to the court in compact form, the judge must meet every witness or juror and administer the oath necessary, or the various records be submitted for inspection. The practice adopted is, for a report by the clerk, and upon this report the judge signs the direction to enter the order. Just such a course as would be, and is, in all proceedings, pursued in the office of First Auditor, First Comptroller and Department of Justice. None of the officers of these departments will pass upon any question without a formal report or statement of the matter before them.

See Erwin vs. U. S., 37 Fed. Rep., 483, and cases cited.

ITEM 31.

Making report to Commissioner Internal Revenue under section 797, R. S., amended March 1, 1879.

Under paragraph 8, section 828, R. S., the clerk is entitled to 15 cents per folio for making any report. The law makes it the duty of the clerk to make this report.

Section 797, R. S., as amended by section 2 of Act March 1, 1879.

ITEMS 45-49-88.

Filing praecipes for Bench Warrant and Mittimus.

The order is entered for bench warrant by the court, but the U. S. Attorney claims to control when the warrant shall issue and the court sustains the Attorney hence the necessity of a praecipe to direct the clerk when to issue same. These mittimus are in *all* cases after the entry of judgment and fine, and are, as an execution, under control of attorney and in many cases never issue, as when the attorney is advised defendant has left for parts unknown, or for other reasons. If not under control of attorney it must be held, clerk should issue mittimus in *all cases*, and same rule would apply to bench warrant, even if known to attorney that defendant has left the country, or on same day warrant is ordered defendant appears in court. See opinion in this record.

ITEM 73.

Filing Subpœnas.

These subpœnas were ommitted in rendering original account for six months, ending June 30, 1888, and are claimed as due the clerk. It is admitted the work was done.

No. 58.

Copy of Sentence and Order Commitment.

These copies are in nature of mittimus and in form charged for, are so made to comply with section 4515, code of Iowa, which provided that the officer—"Shall deliver a certified copy of the entry of the judgment, together with the body of the defendant, to the keeper of the jail or prison in which the defendant is to be imprisoned and take his receipt therefor on a duplicate copy of such entry, which he must forthwith return to the clerk of the court in which the judgment was rendered, with his return thereon."

No. 60-83-91-98.

Filing marshal's accounts and vouchers. Recording orders of court, approving said accounts, making copies of said orders and certificates and seals to same, and same as to U. S. Commissioner, clerk and attorney.

Section 855, R. S., requires order of the court to be entered on its minutes.

Chapter 95, page 333, vol. 18, Statutes at large, regulates the method of taxing the fees in open court.

Under the title, "Instructions and forms for the clerk of the courts of the United States," register of the Department of Justice, 1886, page 265, is the following: "Under Act February 22d, 1875, the accounts and vouchers of clerks, marshals and district attorneys, must be made in duplicate and the clerk is required to forward the originals and vouchers, when approved, to the accounting officers of the treasury and to retain in his office the duplicates. The clerk in forwarding the originals, will certify to the fact that duplicates thereof are filed in his office and he is instructed to forward no original accounts and vouchers unless such duplicates are on file in his office, that the same may be open to the public inspection at all times."

Clause 3, section 828, R. S., provides fee for "filing or other papers." Is it not the duty of the clerk to file any and all papers deposited with him under any provisions of law, particularly that at any time and in any one's hands its proper custody may be known and shown?

This is clearly the construction put upon the law by department of justice in the language used in the instruction above quoted requiring clerk to certify *accounts and vouchers are filed*; in fact the accounts and vouchers do come to the clerk as separate papers.

Take the account of marshal for support of prisoners. Each one of the vouchers are sent to the department of justice for examination, part for signature of general agent, department of justice, and part by attorney-general, sometimes 8 vouchers at a time all comprising one account. The approval of proper officer is put upon *each voucher. they* do not attach them together and simply endorse one of them. These vouchers are returned to the clerk in the same form and condition.

Now, what rule is it that requires the clerk to attach these together and call all eight one paper? I will admit some of the items were not in the original account, the work done being by error ommitted, but the work sued for was done as stated. Erwin vs. U. S., 37 Fed. Rep., 481 and cases cited.

No. 67.

Recording in final record—Motion and affidavit for order of court, for subpœna, for mittimus under sec. 878, R. S. U. S.

No. 68.

Sentence and Judgment.

No. 69-86.

Bench Warrants.

No. 70.

Bail Bonds.

No. 86, (Coms., Transcripts, etc., Amt. 33-45.)

Transcripts of proceedings before commissioners, mittimus and return bench warrants.

The clerk must record all the orders, decrees, judgments, and proceedings. Section 794, R. S.

There are no statutes prescribing what records the clerk shall keep, or how they shall be kept in criminal proceedings.

"In a general way the federal courts must be governed in these respects by the common law." U. S. vs. Maxwell, 3 Dill, 278.

"A court of record is that where the acts and judicialproceeding are enrolled in parchment for the perpetual memorial and testimony."

3 Bl. Common 24.

The petition and order for subpœna on part of defendant at the expense of the United States is part of the proceedings of the case, and in some cases may form an essential part of the record to be reviewed. Erwin vs. U. S., 37 Fed. Rep., 487 and cases cited.

McKinney vs. The People, 2 G., 540-551, is an excellent opinion delivered by Judge Lockwood and which is in many particulars appropriate to the case at bar, it is stated, "that a criminal case after the caption stating the time and place of holding court, the record should consist of the indictment properly endorsed as found by the grand jury; the arraignment of the accused, his plea; the empaneling of the traverse jury; the verdict and the judgment of the court. This is all in general that the record need state."

"It may be remarked that any decision or judgment of the court in the case made preliminary to the final judgment becomes per se a part of the record, but all other matters and proceedings such as motions, exceptions, testimony and the like do not form any part of the record unless made so by order of court."

Harriman vs. State, 2,992,270.

This court has as one of its rules:—"In all criminal cases, unless otherwise specially ordered, the final record entered therein shall include the order made by the commissioner binding the party to appear before the grand jury if any such was made; the indictment; the presentment therein; the bench warrant and return; the plea of defendant; the verdict of the jury and the final order and sentence of the court thereon."

Ever since the creation of a United States District Court in Iowa, it has been the practice to require complete record in criminal cases.

During the term, the record is under control of the judge and the entries therein may be changed. When the term ends, the record is made complete in each case, and being signed, it becomes a verity and cannot be controlled, changed or modified, even by reference to the minutes entered during the term.

The necessity for the entry of a complete record in a criminal case is apparent.

If the defendant is sentenced, having been found guilty, say to imprisonment, the complete record is the best evidence of the right of the Government to hold the prisoner under the sentence. If found not guilty, the defendant is entitled to have the record made out in proper form as evidence of his acquittal.

It would be a curious rule that required complete records to be made in civil cases, affecting only property, but did not require them in criminal cases, wherein life and liberty may be involved.

At common law as stated in 1st Chitty criminal practice, 720, the record "states the service of Oyer & Terminer, the commission of the judges, the presentment by the oaths of the grand jurymen, the indictment, the award of *capias* or process, the delivery of the indictment, the arraignment, the plea, the issue, the award of the jury process, the verdict, the asking prisoner why sentence should not be pronounced, and the judgment."

In practice in the United States, it is not usual to set forth the commission of the judges but to make a complete record, the title of the court, the judge holding same, the presentment or indictment made in proper form by a grand jury, duly empanelled and sworn, the filing same in open court, the bench warrant or process for arrest of defendant, the arraignment or waiver, the plea entered, the order for trial, the calling of petit jury, action or challenge to panel, if any, the submission of case on the ordinance to jury, the verdict, the asking the defendant why sentence should not be pronounced and the sentence or judgments should set forth upon the record. These should not be left as mere memorandums to be gathered from the docket or term record, but be entered in full upon the complete record.

It is apparent that the several steps are necessary and proper to be recorded, for upon a writ of error or upon a habeas corpus, the higher court has the right to have certified to it a complete record, in order that it may appear upon what authority a person is deprived of his liberty.

Section 997 of Revised Statutes, provides that there shall be annexed to and returned with any writ of error for the removal of a cause, an authenticated transcript of the record, and in a criminal case this record should contain the various proceedings showing the jurisdiction of the court over the defendant, and the crime alledged against him, and the proceeding had, resulting in his conviction and sentence, and this is the office of a complete record.

As already said, this record is also needed to show the authority for infliction of the punishment awarded, and also for protection of defendant against another prosecution for same offense.

The whole matter of making a record of any kind, is largely de-

pendent upon the unwritten law, for the Statutes, neither of the State or the United States, provide that a record shall be made of proceedings. The statutes assume that such a record is kept and refers to it in many ways but does not create it.

So as to the complete record it is a matter growing out of the common law, as modified by custom and the necessity therefor, is proven by the fact that it has been kept for so many years.

"It has also had the sanction successively of the department of the treasury, the department of the interior and the department of justice. Until this suit was brought it has never been called in question by an accounting officer of the Government; nor has Congress seen fit to put a stop to it by legislation. This construction of the statute in practice, concurred in by all the departments of the Government, and continued for so many years, must be regarded as absolutely conclusive in effect.

U. S. vs. Hill, U. S. reports 120, 16 p., and references.
Edward vs. Darby, 12 Wheat, 206.
U. S. vs. Temple, 105 U. S., 97.
Ruggles vs. Illinois, 108 U. S., 526.
U. S. vs. Graham, 110 U. S., 219."

"A contemporaneous construction by the officers upon whom was imposed the duty of executing those statutes is entitled to great weight; and since it is not clear that the construction was erroneous it ought not to be overturned."

U. S., Phillbrick, U. S. 120, p. 52.

No. 72.

Issuing Subpœnas.

It is admitted the subpœnas were issued and no reason is assigned for not paying same, the charge for some of them was omitted in rendering the account for 6 months ending June 30, 1888, and claimed now in this suit.

No. 82.

Drawing Bail Bonds.

It is admitted the clerk did the work, but accounting officers say the clerk should only receive pay for 2 folios. The form used when properly filled out has words and figures enough to entitle the clerk to charge for 3 folios, and there is nothing superfluous in the wording of the bond, and the accounting officers do not suggest wherein the bond is defective, but arbitrarily say they will not allow but 2 fo. Reference is made in demurer to form of bond prescribed by the code of Iowa, 1882, p. 1053.

No doubt the form in Section 4698, code of Iowa, is meant, which is in case of appeal from justice court. Ordinarily bonds taken in court of record are more formal and certainly should show the title of the court.

All the bonds charged for are by defendants after indictment.

No. 89.

Making copy of Subpœna for Witness.

Accounting officers claim that clause 51, of section 829, R. S., does not authorize such charge. This is admitted, and the charge is not claimed under such clause, as this paragraph fixes fees payable to

marshal. The clerk makes the copies under the rule of court, "where subpœnas are issued in criminal cases the clerk shall furnish copies thereof to the marshal when delivering to him the original subpœnas." See Erwin vs. U. S., Fed. Rep., 489 and cases cited.

No. 90.

Entry, presentment, etc., in cases No. 193, 194 and 195.

It is admitted that the work was done. Was there any necessity in the proper, or orderly conducting of the business of the court and making records thereof for entry of presentment, filing indictment, etc., covered by this item.

In rendering an account for six months, ending June 30, 1889, an error was made in account for fees in these cases, 193, 194 and 195 and all the charges were suspended for an explanation. An explanation was mailed first comptroller, October 9, 1889, for these and other items, disallowed and suspended, and no notice was ever taken of such reclamation and no allowance, made of such disallowance or suspensions.

No. 92.

Per diem in connection with preparation for and drawing jurors.

Juries are drawn in this district for a term of court, and the business is taken up at a stated time and concluded within a limited time so far as it is necessary to have presence of jury, and when completed the jury is discharged.

That the system of drawing jurors may be understood, it will be necessary to quote the rule of circuit court, adopted by Judge McCrary, and which has been adopted by the district court.

"The juries, both grand and petit, summoned to attend in the several divisions of the district shall be selected from the counties composing the division in which the court is held.

"In selecting the jurors, the clerk and commissioner will strictly obey the following instructions:

"They will not place in the box the name of any person who has been suggested or recommended to them for that purpose except as herein provided.

"They may procure from disinterested citizens of the counties from which the jurors are to be drawn, the names of suitable persons, not less than four hundred in number, selected as far as practicable from all sections of such counties, but they shall not make public nor communicate to any person or persons, the name or names of the person or persons to whom they may apply for such names.

"From the whole number of names thus procured, the clerk and commissioner shall alternately draw a name and place the same in the proper box, until at last three hundred names have been therein placed, and from this box the jurors shall be drawn as provided in section two (2) of the act of June 30, 1879, the clerk and commissioner drawing alternately, until the required number of jurors is obtained.

"Due care must be taken to prevent any other names being placed in the box than those drawn by the clerk and commissioner as above provided, and also to thoroughly intermingle the names placed in the box, so as to secure impartiality in the drawing of the names."

These orders require procuring names of "disinterested citizens of the various counties;" the application to the "disinterested citizens,"

for the names of "suitable persons," record of these names; placing these names upon slips or card to place in jury box; the drawing of the names; report of the drawing to the court; and entering of record of such report, all of which steps are under the direction and by advice and approval of the court? These are new, important and arduous duties placed upon the clerk, not contemplated at the time of enactment of the fee,—bill of 1853.

The services rendered by the clerk, under order of the court, are certainly proper and not unnecessary.

The accounting officers urge there is no provision for paying clerk for such services in the Act June 30, 1879. Neither is there any provision for paying jury commissioner, but he is paid by the treasury.

Erwin vs. U. S., 37 Fed. Rep., p. 474 and cases cited.

No. 94.

Per diem attendance by deputies.

This district is divided into three divisions, and at each place of holding court is a deputy and a separate set of records; and all action by the court must be made a matter of record in the division in which the case is pending.

In many districts the records are kept in one place, when court may at stated times move to other places designated and hold court, and records travel about with the court at such times; and in such cases all action by court is a matter of record at one designated place, the home of the judge, usually. The rights of the parties require the action of the court when the judge thereof may be holding a term in another division, and, in law, in the three divisions the term of such division may be open, and is so for the convenience of the litigants at all times.

See Erwin vs. U. S., 37 Fed. Rep., p. 475, and cases cited.

No. 95.

Filing attorney's disharge of witnesses.

The practice in this district regarding discharge of witnesses under control of the U. S. Attorney has been, and is, this: When the U. S. Attorney is through with witness he is given a written discharge, which is presented to the clerk, upon presentation of which the clerk administers the oath of attendance, having in the subpœna record the date for which witness was subpœnaed, and place where subpœnaed, as a check. The clerk is not permitted to issue certificate for the pay of per diem and mileage except upon presentation of this discharge. The practice originated, as did also the other steps in the payment of witnesses, in the desire of the court to prevent any unlawful payments, there having years ago in this State been some scandal connected with the discharge and payment of witnesses.

The clerk files all these discharges, and with the fee of ten cents for filing it costs less under the system in this district to discharge and pay each witness than under other systems.

From the foregoing presentation of the facts, I trust it has been made plain in what the principal difficulty lies in the settlement of the accounts of the clerks of the United States courts.

The section of the statutes providing for the fees to be charged

classifies the services for which a fee may be demanded under a variety of heads.

Thus it is enacted that a fee is allowed, among other things:—"For filing and entering every plea, declaration, or other paper—ten cents."

"For entering any return, order, continuance, judgment, decree, or recognizance, or drawing any bond, or making any record, certificate, return or report, for each folio—fifteen cents."

"For a copy of any entry or record, or of any paper on file, for each folio—ten cents."

In a given criminal case, a paper is filed, in the record thereof certain matters are included and a copy of a paper on file, for instance the indictment, is made and furnished to the defendant.

For these services the statutory fees are charged by the clerk, but the accounting officers disallowed them because, in their judgment, there was no necessity for filing the paper, making the record, or furnishing a copy of the paper to the defendant.

As I understand the fact to be, there are three general sources of authority to which recourse may be had in determining the duty of the clerk and what is required of him in the proper and orderly discharge of his official duties These are:

1st. The provisions of the statutes of the United States.

2d. The provision of the statutes of the State, so far as they deal with the matters not provided for in the statutes of the United States, and so far as they are recognized and enforced by the United States Court as proper rules to be observed in the conduct of the business of the court.

3d. The rules and orders of the court by it adopted and made in proper form, either generally or specially.

If, therefore, the statutes of the United States, or the statutes of the State, so far as the same are recognized as forming rules of practice to be followed in the deposition of cases in the United States Court, or the general rules of practice adopted by the United States Court, or a special order made in a given case, require the clerk to file in criminal cases, certain papers, or to include certain matters in the record, or to furnish copies of certain papers, such as the indictment, subpœnaes, or the like, then it is the duty of the clerk so to do; and as the services fall within the classes for which compensation is provided in the statute, the clerk is entitled to the fee therein provided as a matter of law.

Practically, on part of the accounting officers at Washington, it is claimed that it is for them to determine what papers should be filed, what should be entered as part of the record, and of what papers copies should be made and furnished.

Certainly no argument is needed to support the proposition that the clerk, in filing papers, making records, and furnishing copies, is bound to obey the orders of the court of which he is clerk, whether the same are formulated in general rules, written or unwritten, or in special orders made to meet the exigencies of a given case.

The suggestion has been made that for such services the clerk can look for compensation to the defendant, but this can not be true.

There can be adjudged against the defendant only such costs as are lawfully chargeable by the clerk.

If the fees come within the fee bill, the clerk is entitled to them in allowance of his account.

If they do not come within the fee bill, they are not chargeable as costs in the case, and can not be collected from the defendant.

Therefore the clerk is now placed in the following position, according to the present practice of the accounting officers:

The clerk is lawfully required and compelled to file certain papers, to make a certain record, and to furnish copies of papers on file, like indictments, subpœnas, etc.; all of which services are of such a nature that fees are allowed therefor by the statute of the United States, but the clerk is denied compensation therefor because in the judgment of the accounting officers, the filing such papers, or making such record, or furnishing the copies was not neccessary.

In times past the practical difficulties of the situation have been enhanced by reason of changes of officials in the department at Washington.

It not unfrequently happens that after a voluminous correspondence and full explanation made, the department admits the correctness of a given class of fees charged, or the clerk accommodates his accounts in a given particular to the views of the official then having the supervision thereof; but in a short time, through a change in the official, all that has been settled is ignored and the same round of explanation has to be given again and entered upon.

This uncertainty is the neccssary consequence of the system that has been heretofore pursued.

If the rules, regulations and orders which govern and control the clerk when he is performing his duties as clerk of the court, and in regard to which he has practically no choice, are not to be recognized by the department in allowing his account, but the same is to be settled according to the judgment of the accounting officers, then the clerk is without a guide in making out his accounts, except the varying and changing views of the accounting officers.

A. J. VAN DUZEE,
Pro se.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM 1890.

NO. 1244.

THE UNITED STATES, Appellant,

vs.

A. J. VAN DUZEE, Appellee.

APPEAL FROM U. S. DISTRICT COURT FOR S. D. IOWA.

FEES OF CLERKS OF U. S. COURTS.

BRIEF OF THOS. A. HEDRICK FOR APPELLEE.

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Office Supreme Court U. S.
FILED.
FEB 25 1891
JAMES H. McKENNEY,
CLERK.

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By courtesy of appellee and the Attorney and Solicitor Generals I submit an argument upon certain parts of this case, being so much as is common to it and the appeal of United States vs. Jones, No. 1118 of this term's docket.

As the brief for the United States has not yet reached me, I briefly state the case.

I.—STATEMENT.

This is a suit for $587.15 under the act of March 3, 1887, by a clerk of United States Courts on an account for fees for services rendered the United States by him, disallowed at the Treasury. The account had been previously proven in due course in open court. To the complaint, which has annexed a bill of

items, the defendant demurred. The court overruled the demurrer, and defendant appeals. There are a number of similar cases, but this was advanced on motion of United States as "typical" and now comes on for hearing.

II.—ERRORS ASSIGNED.

The defendant does not specify any errors in particular but claims every allowance by the court below contrary to its 44 grounds of demurrer was error. The demurrer is worded more like a plea than a demurrer, as it travels out of the complaint to find and set up defences. But it seems to have been treated below as a deposition or statement of facts and will be so argued. I shall discuss the law of fees of clerks for United States Courts so far as common to the two cases under heads and concerning the grounds of demurrer as follows:—

(1)—Filing papers returned in criminal cases by United States commissioners, covered by grounds of demurrer Nos. 1 and 8, pp. 19-20 of printed record.

(2)—Expenses connected with qualification of court officers, approval of their accounts, &c., covered by grounds of demurrer Nos. 2, 18, 20, 40, pp. 19-22 of printed record.

(3)—Duplicate orders under seal to marshal to pay supervisors, witnesses, &c., covered by grounds of demurrer Nos. 10, 25, 30, 33, 41, pp. 20-22 of printed record.

(4)—Final record in criminal cases, covered by ground of demurrer No. 42, p. 22 of printed record.

(5)—Copies of subpœna, &c., covered by ground of demurrer No. 44, p. 22 of printed record.

There is no question that all these services were rendered the United States and should be paid for by the United States if they fall within the fee bill, Rev. Stat. sec. 828.

III.—POINTS OF LAW AND FACT.

1.—FILINGS.

The objection urged by the accounting officer to the charge for filings is that the papers from the United States commissioners in criminal cases should be fastened together and filed

as one, except that they allow a separate fee for each final recognizance. The fee bill allows ten cents for filing "*every..... paper.*" (Rev. Stat. Sec. 828.) There certainly is no authority for filing one by itself and then filing a bundle made up of all the others as another single paper. The object of filing is identification and preservation, and anything short of filing and marking "every paper" will not effect this object or conform to the very words of the statute. The business of this great government should be done in a business way and a picayune policy like that attempted by the accounting officers is not fair to the government, to its employees, nor to the public. It cripples public business and discourages faithful public servants, compelling them to resort to the courts and await the law's delay. All papers sent up properly to the court should be filed. The question merely is, *What* papers should be sent up by the commissioners? Rev. Stat. sec. 1014 requires copies of process and the recognizances of witnesses to be "returned as speedily as may be" into the proper court. This process includes warrant of arrest and mittimus or bail bond, at least, and the practice— in many districts covered by rule of court— is for all the original papers to be returned for use of the district attorney and grand jury. In cases affecting the life or liberty of the citizen all papers are important. This practice has never been disputed by the United States. They only dispute paying the fees necessarily caused by it, for, if "returned," "every paper" must be filed just as it is received.

Erwin vs. U. S., 37 Fed. R. 482.

Much the same principle is involved here as in the case of filing the marshal's duplicate vouchers. No question is made that the law requires duplicates of the accounts and vouchers sent to Washington for payment to be filed and preserved in court, and I respectfully insist that so far as they are in fact separate papers separate filing fees are proper. The accounting officers, however, again pursue their parsimonious views and require bundling. Mr. Justice Brewer passed on this point while circuit judge in the case of Goodrich vs. United States, 35 Fed. Rep. 194, and says very justly,— "In fact each voucher was a different paper, and related to a distinct transaction, and the statute allowed the clerk for 'filing and entering every declaration, plea, or other paper, ten cents.' Of course this means for every separate paper that is filed, and therefore he is entitled to the full amount claimed."

It would seem as if the language of the statute were too plain for discussion. Every paper should be separately filed.

2.—OFFICER'S EXPENSES.

The comptroller declines to pay for filing and recording oaths of marshals, filing their accounts, and other incidental expenses, because these should be borne by the officer.

The opinion of the court below very fairly answers this. (Record printed page 24.) These are necessary expenses of the public service and should be borne by the government.

Analogous is the contention that all expenses of proceedings in court to insure the correction of commissioners' accounts should be borne by the commissioner. In the case of Knox vs. U. S., 128 U. S., 230, it was decided that all the commissioner has to do is to send his account to the district attorney and the government is at all further trouble and of course at all further expense. The officer has done his part when he sends in his bill and all the machinery of auditing is for the convenience of the government and at its expense.

Jones vs. U. S., 39 Fed. R. 410.
Erwin vs. U. S., 37 Fed. R. 481.

The steps of this auditing are given in the act of February 22, 1875, 18 Stat. at Large, p. 333. As remarked in Knox vs. U. S., *supra*, the government even resorts to the practice of making courts part of the auditing department, but it is all for the protection of the United States. The officer could sue without waiting for it to drag its slow length along and can prove it in another forum. If not necessary to his case, it certainly cannot be at his expense. If this audit in the lower court is looked on as a suit, the view taken in U. S. vs. Jones, 134 U. S. 483, then these expenses are costs of suit, and should be paid by the unsuccessful party, the United States.

3.—SEALS.

The court is required by R. S., sec. 855 to make orders for payment of witnesses, &c. The clerk furnishes the marshal with a certified copy thereof as his warrant, to be forwarded with his vouchers to the accounting officers at Washington. The Treasury says a seal is unnecessary to this copy, because, as the marshal is an officer of the court, it amounts to one officer certifying an order of court to another officer of the same court under the seal of their common tribunal. This proves too much, as, if the marshal is theoretically present in court and can know the or-

der of the court without a seal, he can just as well know it without a copy of the order. The fact is that the seal is necessary as much to show to the accounting officers that he acted under an authentic order as for any other reason. The proper authentication is by a seal of court, and the clerk is entitled to his fee therefor. It is the seal that shows the order was made by the court.

4.—FINAL RECORD.

The fee bill is so general that it is difficult to make application of its provisions to all cases. The clerk is allowed a fee for making records. But in making up a final record in a criminal case, how much of the proceedings before the committing magistrate shall he include? All the papers returned to the trial court? If not, what is the principle of selection?

It is the record of the commissioner of his actions that when filed in court gives jurisdiction.

Stanton vs. U. S., 37 Fed Rep. 259.

The defendent can then appear in court and ask reduction of bail. Surely then it is a case in court and at least the jurisdictional papers should be recorded, say, the complaint, warrant, return, judgment record, final process, bail, &c. These papers being properly returned by the commissioner into the court by law or rule of court, and being the foundation of all subsequent steps of the prosecution, why are they not court papers from their filing in court and to be recorded as such? Take the bail bond or the recognizance of witnesses. They may become the ground of *sci. fa.* proceedings and it is highly important that they should be recorded for safe preservation as well as because they are court papers. All papers "returned" to the court become a part of its records and proceedings, and no distinction between court papers is to be recognized.

5.—COPIES OF SUBPŒNAS.

A most singular ground of demurrer is presented by No. 44. It sets up that as the marshal is prohibited by Rev. Stat. sec. 829, paragraph 5, from charging more than 50 cents for serving a subpœna, therefore the clerk shall not be paid anything for making the very copy the marshal serves. This *non sequitur* is hardly worthy of discussion. The universal practice is to ex-

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To state this point is sufficient proof of it.

I think this brief discussion is sufficient to show that the court below committed no error in overruling the demurrer of defendant in the matters mentioned. As said by district court in Erwin vs. U. S., 37 Fed. Rep., 494, clerks are inadequately compensated at best, and the strained construction that tries yet further to reduce their pay should not be tolerated.

The advancement of this case was with the view to settling practical questions in the auditing department, and therefore I have discussed the matter on the merits and not relied on technical points. The allowance by the court below on the original presentation of the account established it *prima facie*, as held in United States vs. Jones, 134 U. S. 483, and the remarkable demurrer of the district attorney in the present suit certainly did not overcome this *prima facies*. But I trust the court will look beyond this and go into the merits and decide the points involved for the guidance of all officers in future.

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THOS. A. HAMILTON,

Of counsel for Appellee.

SUPREME COURT OF THE UNITED STATES.

Ex parte. In the Matter of the Petition of PETER J. CLAASSEN for a Writ of Mandamus

against

CHARLES L. BENEDICT, Judge of the Circuit Court of the United States for the Southern District of New York.

PETITION FOR WRIT.

HECTOR M. HITCHINGS,
Attorney for Petitioner,
132 Nassau St., N. Y. City.

LIVINGSTON MIDDLEDITCH & CO., Printers, 149 to 152 Leonard Street, N. Y.

SUPREME COURT OF THE UNITED STATES.

In the matter of the Petition of PETER J. CLAASSEN, for a writ of mandamus,

AGAINST

CHARLES L. BENEDICT, Judge of the Circuit Court of the United States for the Southern District of New York and the United States of America.

To the Honorable, the Supreme Court of the United States.

The petition of Peter J. Claassen, respectfully shows to this Honorable Court:—

I.—That at a Criminal Term of the United States Circuit Court for the Southern District of New York, presided over by Hon. Charles L. Benedict, Circuit Judge, in May, 1890, your petitioner was brought to trial and was tried by the said Judge and a Jury, for certain crimes and misdemeanors against the United States of America, under Section 5209 of the Revised Statutes of the United States, in an action wherein the United States of America was plaintiff and your petitioner was defendant, and that on the 28th day of May, 1890, the aforesaid Jury found your petitioner guilty on five of the counts upon which he was tried and innocent upon the others.

That during the course of said trial a very large number of exceptions were taken to the rulings of the said Circuit Judge, which exceptions have never

been passed upon by any Appellate Tribunal, and which will be found more particularly set out in an assignment of errors, the original of which was duly filed in the Clerk's Office of the Circuit Court of the United States for the Southern District of New York on the 21st day of March, 1891, and a copy of which is hereto appended, and is marked Exhibit I. That said assignment contains exceptions only which were regularly and properly taken upon the trial of the aforesaid action and before the Jury retired.

II.—That subsequently to the rendition of said verdict and as provided by the rules of practice of said Circuit Court, a motion for a new trial and in arrest of judgment was sued out by your petitioner before the Court in Banc, as provided by the Criminal Rule of said Circuit Court passed May 12, 1879, and for the purpose of that motion, a case was made and settled in accordance with Rule 67 of said Circuit Court, a copy of which case is hereto annexed, and is marked "Exhibit II," and upon said case such motion for a new trial was heard before said Court in Banc, composed of Hon. William J. Wallace, Circuit Judge, and Hon. Addison Brown and Charles L. Benedict, Judges, and said motion was thereafter and on the day of December, 189., by said Court denied. That upon such motion for a new trial only one point was made and argued, viz.: that the Circuit Court of the United States had no jurisdiction of the action or of the defendant.

III.—That from said 8th day of May, 1890, until the present time, your petitioner has been kept closely confined in Ludlow Street Jail in the City of New York, and that after the denial of your petitioner's motion for a new trial, as aforesaid, no motion to sentence your petitioner was made by the District Attorney of the United States for the Southern District of New York, and sentence in your petition-

er's case remained suspended until the 18th day of March, 1891, for the express purpose, as your petitioner is informed and believes, of enabling the evidence of your petitioner to be taken and used against one James A. Simmons, in the trial of the action of the United States against said Simmons, the said defendant having been indicted under the same section as your petitioner, for aiding and abetting your petitioner in the crimes and misdemeanors for which your petitioner was convicted, and that from the day of December, 1890, until the 18th day of March, 1891, there was no stay or arrest of judgment, and nothing to prevent your petitioner being called up and sentenced, and that said suspension of sentence was not due to any request of your petitioner.

IV.—That on the 3d day of March, 1891, there was signed by the President of the United States, an Act of Congress, entitled "An Act to define and regulate the jurisdiction of the Courts of the United States," and that by the signing of said Act, the same from that moment became a valid and existing law of the United States, and that the same went into immediate effect, as your petitioner is informed and believes.

V.—That said Act last above mentioned contains, among other things, the following provision, to wit: "Section 5.—That appeals or writs of error may be taken from the District Courts or from the existing Circuit Courts direct to the Supreme Court in the following cases: In case of conviction for a capital or otherwise infamous crime."

VI.—That your petitioner was called up for sentence on the 18th day of March, 1891, some fifteen days after said Act had gone into full force and effect. and was sentenced by said Circuit Judge, Charles L. Benedict, to serve a term of six years in the Erie County Penitentiary, and that said sentence made

13 the crime of which your petitioner was convicted an infamous crime and within the provision last above recited.

VII.—That immediately upon the imposition of said sentence your petitioner's counsel, Mr. Hector M. Hitchings, applied under said Act to said Judge Charles L. Benedict, for a Writ of Error to this Court and for a stay of execution of sentence, and your Petitioner is informed by his said counsel and believes, that Mr.
14 Justice Benedict, after considering the matter for a day, announced to your Petitioner's Counsel that he would grant the writ, but would not grant any stay of execution of sentence, and that thereupon your Petitioner's Counsel withdrew his application for said writ and applied to Mr. Justice Blatchford, one of the associate Justices of this Court, at Washington, where said writ was, on the 21st day of March, 1891, duly signed by said Justice and the same directed to act as a supersedeas, as will be
15 more fully seen by reference to the copy thereof which is hereto annexed and marked "Exhibit III."

That on the same day on which said writ was granted, to wit: on the 21st day of March, 1891, the assignment of errors referred to above and annexed hereto and marked Exhibit I, was, pursuant to Rule 35, promulgated by this Court November 3d, 1890, duly filed in the office of the Clerk of the Circuit Court of the United States for the Southern
16 District of New York, in New York City.

That subsequently to the filing of said assignment of error, and on the 21st day of March, 1891, there was filed in the Clerk's office of the Circuit Court of the United States for the Southern District of New York, and thereafter and on the 25th day of March served upon your petitioner's attorney a joinder in error, a copy of which is hereto annexed, marked

Exhibit IV, and to which your petitioner begs leave 17
to refer.

VIII.—That subsequently thereto, as your petitioner is informed by his said counsel and verily believes, your petitioner's counsel was diligently engaged, night and day, in reducing the evidence which was taken in the action against your petitioner, together with the exceptions which were taken upon the trial, to a proper and suitable form for transmission to this Court, for the purpose of presenting the evidence necessary for the considera- 18
tion of this Court in passing upon the errors more particularly specified and set out in your petitioner's assignment of errors, mentioned above, and in the preparation of a Bill of Exceptions, and that on the 10th day of April, as your petitioner is informed by his said counsel and believes, a perfect and proper Bill of Exceptions, regularly and properly drawn in accordance with the decisions and rules of this Court, and containing in itself the errors sought to be reviewed and which were made 19
upon the trial, and such evidence only as was necessary to properly present them, was presented to Mr. Edward Mitchell, District Attorney of the United States, for the Southern District of New York, for amendment or correction, and by him refused upon the ground, as your petitioner is informed and believes, that he was no longer the attorney in the case, but that the matter was in charge of the Attorney General of the United States, and upon the further ground, as 20
he has since claimed that a bill of exceptions was once made in the action against your petitioner upon the motion for a new trial, and that no other or subsequent bill could now be made, and that thereafter and on the same day the said bill of exceptions was presented to the Hon. Charles L. Benedict, in person, for settlement and allowance,

21 which settlement was at said time refused, upon the ground that no notice of settlement or copy of said proposed bill had been served upon the proper attorneys for the defendant in error, and that the bill presented by your petitioner's attorney contained no proof of any such submission or notice. That thereupon and on the same day, to wit, the 10th day of April, 1891, a copy of said bill of exceptions, consisting of one hundred and eighty-five (185) pages of typewritten matter, together with
22 notice of settlement thereof for April 15th, 1891, was duly served upon said Edward Mitchell, Esq., and thereafter said notice of settlement was extended by stipulation to April 18th, 1891, before the Hon Charles L. Benedict at his chambers in New York City.

IX.—That the writ of error issued by Mr. Justice Blatchford was returnable into this Court on the 13th day of April, 1891, but that in consequence of your petitioner's inability to get his bill of ex-
23 ceptions settled as aforesaid, upon affidavit and application duly made, the time to file and docket the record herein was enlarged by Mr. Justice Blatchford to April 28th, 1891. That the term of Court at which your petitioner was sentenced had not expired on April 10, 1891, has not yet expired, and does not expire until the second Tuesday of May, 1891.

X.—That on the 16th day of April, 1891, as your petitioner is informed and believes, the minute
24 book kept by the Clerk of the Circuit Court for the Southern District of New York, for the entry of proceedings in criminal cases in said Court, was altered and amended upon the suggestion and at the request of said Edward Mitchell, Esq., District Attorney of the United States as aforesaid, by the insertion upon the margin thereof, opposite to the entry therein of the occurrences before the Court in Banc on October 24th, 1890, the following entry, namely:

"

THE UNITED STATES

AGAINST

PETER J. CLAASSEN.

Friday, October 24th, 1890.

Before Hon. Mr. Justice WALLACE, Circuit Judge, and CHARLES L. BENEDICT and ADDISON BROWN, JJ.

Defendant moves to postpone the argument of motion for new trial and arrest of judgment and for leave to make and file a new case with new exceptions.

Mr. John D. Townsend is heard in support of motion. Mr. Edward Mitchell, United States Attorney, opposed.

Motion denied by the Court."

That prior to said 16th day of April, 1891, no entry of any such occurrence existed on said minute book or any other book.

That annexed hereto will be found a full and complete transcript from the Clerk's minutes of said Court, including the addenda last specified, which transcript is marked "Exhibit V."

That whatever motion was made before said Court in Banc by your petitioner's counsel was entirely oral, no affidavits being made or submitted to that Court; was addressed to the clemency of said Court, and no written order was ever made or signed by it, and the aforesaid entry was made without notice to your petitioner's counsel, without any order of any Judge of said Court in Banc, or of any other Court to the knowledge of your petitioner, and your petitioner says that with the exception

of said entry, there is no record in the minutes of said Clerk relating to said motion, and no paper to show the same, on file, and your petitioner begs leave to refer to the facts concerning the same at this time for the reason that the said proceeding is set out in the opinion of Mr. Justice Benedict, hereafter referred to as a proceeding in the action, and was used upon argument before him by the United States District Attorney, and your petitioner believes that the same will be used or attempted to be used upon the argument before this Court.

XI.—That, as your petitioner is informed by his said counsel and believes, at the time mentioned in the stipulation to which the settlement of the proposed case was adjourned, to wit, the 18th day of April, 1891, your petitioner's counsel presented to Mr. Justice Benedict his proposed bill of exceptions and asked that the same be settled and allowed, and that thereupon Mr. Edward Mitchell, District Attorney of the United States for the Southern District of New York, presented for the consideration of said Justice certain objections to the making and preparation and settlement of said bill of exceptions, which objections, however, had not been theretofore reduced to writing or served upon your petitioner's counsel, although your petitioner's counsel had had some oral intimation of what the same might be, and did not set out that the bill of exceptions did not properly record what occurred at the trial, or that the exceptions taken therein were not taken at the trial, but that said objections went to the right of your petitioner to have any bill of exceptions other than the one claimed to have been made and settled on the motion for a new trial; that an argument thereupon took place before said Justice, as to the propriety of the presentation of the same at this

time, and as to your petitioner's right to have the 33
bill presented, settled and allowed, and that thereupon said Justice, without examining the contents of said bill of exceptions at all, or taking the same into his custody or possession, took into consideration, as your petitioner is informed and believes, the question of whether your petitioner had, at this time, a right to make any bill of exceptions.

That, as your petitioner is informed by his aforesaid Counsel, Hector M. Hitchings, and believes, every single objection and exception mentioned and 34
specified in said bill of exceptions, together with every particle of testimony set out therein, was actually taken at the trial of said action of the United States against your petitioner before the jury retired for deliberation.

XII—That on the 23d day of April, 1891, as your petitioner is informed by his counsel and believes, Mr. Justice Benedict handed down and filed with the Clerk of said Circuit Court of the United States, an opinion and decision in writing, wherein and 35
whereby he decided that the objections to the making and settlement of said bill must be sustained, and allowance and settlement thereof denied, and he therefore refused to settle and allow the same. That the ground stated by said justice for refusing is that the case made on the motion for a new trial, was in the nature of a bill of exceptions and precludes the making of a second bill of exceptions at this time.

XIII.—That your petitioner is informed and 36
believes, that if he is unable to present to this Court, by bill of exceptions in due and proper form and properly settled and allowed by the trial justice, the errors complained of, he will be utterly remediless, and will be deprived of all benefit given to him by the Act of Congress of the United States under which he has taken out his writ herein and

by his said writ, and that this Court will not consider such bill of exceptions, if returned, unless the same is settled and allowed by said trial judge. That the errors complained of have been frequently decided by Courts of the highest authority to be such as will entitle your petitioner to a new trial and a reversal, as your petitioner is informed and believes, and are not frivolous or made for purposes of delay.

And your petitioner has no other remedy to bring the refusal of said Circuit Court to settle said bill of exceptions before this Court except by this Court's most gracious writ of mandamus.

XIV.—Your petitioner further states that he was imprisoned in Ludlow Street Jail in the City of New York, and has been so imprisoned since the 28th day of May, 1890, and your petitioner is therefore desirthat an early date may be set for the hearing of your petitioner's writ, to the end that the records and proceedings of said Circuit Court may be promptly certified and returned into this Court, and that your petitioner may move this Court for an advancement of his cause upon the calendar of this Court and for an argument before the adjournment hereof for the summer, or that he shall be admitted to bail in such sum as shall be reasonable during the time that the argument hereof shall be postponed.

Your petitioner therefore prays this Honorable Court that there may be granted to him this Court's most gracious writ of Mandamus, addressed to the Hon. Charles L. Benedict, commanding him, to settle and allow said bill of exceptions without delay, according to the truth of the matters which took place before him on the trial of said action of the United States *vs.* your petitioner, and to sign the same when settled and allowed, as of the 10th day of April, 1891, and that your petitioner may

have such other or further relief in the premises as may to this Court seem just and proper.

And your petitioner will ever pray, etc.,

Dated New York April 25, 1891.

Hector M. Fitzhugh
Attorney for Petitioner

P. J. Claassen

City and County of New York, ss.:

PETER J. CLAASSEN, being duly sworn, says he is the petitioner above named; he has read the foregoing petition and knows the contents thereof, and that the same is true of his own knowledge, except as to the matters therein stated to be alleged on information and belief as to those matters, he believes it to be true.

Sworn to before me, this 27 day of April, 1891.

P. J. Claassen

A. S. Levy
Notary Public
N. Y. Co

(Seal)

45

Exhibit I.

IN THE SUPREME COURT OF THE UNITED STATES.

PETER J. CLAASSEN,
Plaintiff in Error,

46 vs.

UNITED STATES OF AMERICA,
Defendant in Error.

On the 21st day of March, in the year of our Lord one thousand eight hundred and ninety-one.

47 Afterward, to wit, on the 21st day of March, of this Term, before the Justices of the Supreme Court of the United States, at the Capitol, in the City of Washington, comes the said Peter J. Claassen, by Hector M. Hitchings, his attorney, and says that in the records and proceedings aforesaid there is manifest error in this, to wit:

1.—ALONZO B. HEPBURN, United States Bank Examiner, having closed the Sixth National Bank,
48 on the evening of the 29th of January, 1890, was interrogated as follows:

"Q. Did you have any instructions from the Comptroller of the currency to close that bank?

A. No, sir.

Q. But you did not put this notice upon this bank by direction of the Comptroller of the currency, did you?

A. Well, if you mean specific directions at that time, no. No, sir; I act under general orders and directions. 49

Q. Then you closed it upon your own judgment; did you?

A. Yes, sir.

Q. (By Mr. Tenney.) What are your duties as Bank Examiner?

Objected to as immaterial, incompetent and irrelevant. Objection sustained, and defendant excepts. 50

Q. Had the 6th National Bank, to your knowledge, refused to redeem its circulating notes?

Objected to on the ground that it does not appear that it had any. Objection sustained. Exception.

The Court: I rule generally that everything that happened after the bank closed is immaterial to this issue. 51

Counsel for defendant takes an exception.

Q. Do your duties as Bank Examiner include going up and down the town inquiring as to the responsibility of depositors?

Objected to as immaterial, irrelevant and incompetent. Objection sustained and defendant excepts."

2. Philip L. Myer, having been called as a witness for the prosecution, and having been examined, testified: 52

"Q. When we were closing the examination yesterday, I think we left you with Mr. Pell in Liberty street, Pell having bonds which he gave to you on the morning of the 23d. Do you remember that?

A. Yes, sir.

53 Q. How many bonds did Mr. Pell give to you on the morning of the 23d of January?

Objected to as immaterial, incompetent and not connected with the defendant. Objection overruled. Exception.

A. 100.

Q. Did you receive another lot of bonds from Pell on that same day—later in the day?

Same objection, ruling and exception.

54

A. I think so; yes, sir.

Q. How many?

Same objection, ruling and exception.

A. 110 or 115, I don't exactly recollect which. I think it was 110.

Q. About what time of the day?

A. Half-past two.

Q. What did you do with the first lot of these

55 bonds of 100, received about noon.

Same objection, ruling and exception.

A. I took them to Theodore Myers & Co.

Q. Theodore W. Myers & Co.?

A. Yes, sir.

Q. What did you do with them there?

A. Got $100,000 that was advanced on them.

Q. You got $100,000 of moneys advanced?

A. Yes, sir.

56 By the Court:

Q. Loans?

A. No, sir; not loans; advance.

Q. Advanced on the securities?

The Court: They sold the securities?

The Witness: The securities were left for sale.

Q. You left the securities there for sale?

A. Yes, sir.

Q. And you obtained these advances? 57

A. Yes, sir.

Q. In anticipation of the subsequent sale by Myers?

Same objection, same ruling and exception.

A. Yes, sir.

Witness testified that he received three checks which he identified. Counsel for plaintiff offers in evidence three checks made by Theodore W. Myers 58
& Co., one dated January 3, 1890, on the Continental National Bank, to the order of S. T. Myers & Son, for $50,000; a second check, dated January 3, 1890, on the Continental National Bank, to the order of P. L. Myer, for $33,000; and a third check, dated January 23, 1890, on the Continental National Bank, to the order of P. L. Myer, for $17,000.

Objected to as immaterial and incompetent, and that the defendant is not connected with 59
them.

Objection overruled. Exception by defendant.

Q. What did you do with the bonds which you received from Pell at 2.30 in the afternoon of the 23d?

THE COURT: How many did you say that was?

THE WITNESS: 110 or 115, I don't recollect which.

Q. What did you do with them? 60

A. Brought them to Sheldon & Co., William C. Sheldon & Co. There I got a check for advances, and left the bonds, with instructions to sell them. This paper is the check which I received (identifying it).

Counsel for plaintiff offers in evidence the check, which reads as follows:

61 "NEW YORK, January 23, 1890.

Bank of North America. Pay to the order of P. L. Myer, one hundred and ten thousand dollars. $110,000.00.

WILLIAM C. SHELDON & Co.

Same objection, ruling and exception."

On the 24th of January witness received 180 other bonds mentioned in a list in the hands of the district attorney. He thinks he received them in two
62 lots; in the first lot, 100.

"Q. About what time of day?

A. Somewhere about noon, I should think.

In the second lot, 80, received about 2.30. Of the first lot witness took 50 of them to Theodore W. Myers & Co., and the second lot took 50, or gave his brother 50, to take, to E. K. Willard & Co., could not state positively whether it was 50 or 56 of the first lot; the second lot he took to Theodore W. Myers & Co.

63 Q. When you took the first lot of 50 to Theodore W. Myers & Co., did you receive anything from them, from the bonds or on the bonds?

A. Yes, sir.

Q. That check (handing witness paper)?

A. That is the check.

Q. You left the bonds to be sold?

A. Yes, sir.

Q. Was $50,000 advanced on them?

A. Yes, sir.

64 Counsel for plaintiff offers in evidence the check mentioned in last question to the witness.

Objected to on the grounds previously stated, and on the additional ground that by the testimony already given, it would be impossible for the proceeds of these checks to have gone toward the payment for the stock.

Objection overruled. Exception.

The checks were then read in evidence.

Q. What did you do with this check after receiving it? 65

Same objection, ruling and exception.

A. Got the money for it.

Q. Where?

A. At the Western National Bank.

Q. What did you do with the money that you got from the Western National Bank?

A. Gave it to Mr. Pell. Mr. Pell was not with me. 66

Q. With reference to the second lot received on the 24th, what did you do with these?

A. I gave that check to Mr. Pell.

Q. What did you do with the bonds first?

A. Took the bonds to Theodore W. Myers & Co.

Q. $80,000?

A. Yes, sir.

Q. And received this check from Theodore W. Myers & Co? 67

A. Yes sir.

Q. On delivering $80,000 of these same bonds that you have been referring to?

A. Yes sir.

Counsel for plaintiff offers in evidence the check last referred to, as follows:

"NEW YORK, January 24, 1890.

CONTINENTAL NATIONAL BANK:

Pay to the order of P. L. Myer, eighty thousand dollars. 68

$80,000.00 THEODORE W. MYERS & Co."

Same objection, ruling and exception.

Q. What did you do with this check after receiving it?

A. Gave it to Mr. Pell.

69 Q. What was done with it after that?

A. He gave it to me back again.

Q. With any request?

A. To get him the money for it. I got for him from the Bank of North America a cashier's check for $80,000.

Q. Will you look at this paper, and state whether that is the cashier's check which you refer to?

A. Yes, sir.

70 Counsel for plaintiff offers in evidence the paper last referred to, being cashier's check of the Bank of North America for $80,000.

Same objection, ruling and exception.

Witness received a further check from Theodore W. Meyers & Co., as advances on or proceeds of bonds left with them, which he identifies, dated January 29, on the Continental Bank, to S. T. Myer & Son, for $20,000.

71 Check offered in evidence.

Same objection, ruling and exception.

On the 24th of January, witness received $50,000 in cash from the Myers & Company check; $56,000 in cash from the Willard check, and $85,000 in cash of the proceeds of a loan to the Western National Bank—amounting in all to $191,000 in bills.

Q. (By the Court): All turned into bills at the request of Mr. Pell?

A. Yes, sir.

72 Q. What did you do with the $191,000 in money?

Same objection, ruling and exception.

A. I gave it to Mr. Pell, the whole of it.

Q. What did Pell do with it?

A. Gave me, I think, $75,000 or $76,000 in cash back.

Witness also identifies another check of $10,000

which he received from some Coeur d'Alene bonds 73
which were taken to Sheldon & Co.

Counsel for plaintiff offers in evidence the check above referred to.

Same objection, ruling and exception.

Check admitted, and read.

On CROSS-EXAMINATION witness testified:

Was first introduced to General Claassen last summer, I think, by Mr. Simmons; have not associated with him on terms of intimacy since; never had 74
any business transactions with him or any interviews with him on business matters, except a conversation in which he told witness that a stock house on the street had a large amount of English capital which they were going to invest in American securities. Witness never received a check from Claassen in his life; never exchanged checks personally with him of any kind.

Q. In what way did these checks of Claassen get into your hands, that you spoke of having? 75

A. Mr. Pell would borrow some money from me for Mr. Simmons, and the day following I would get, perhaps, a check of two or three thousand on the payment of the loan back. I would always take it.

Q. How long have you known Mr. Pell?

A. I could not say exactly. I think a couple of years.

Q. In the transactions with Mr. Pell, did you understand, or did he give you to understand, that 76
you were dealing with him directly, or as the representative of some other person?

A. The representative of Mr. Simmons.

Q. In all your transactions did you recognize him as the representative of Mr. Simmons?

A. Yes, sir.

Q. Did you have any talk with Mr. Claassen be-

77 tween the 22d of January and the 29th of January, 1890?

A. No, sir. I had no interviews with him at all.

Q. In any of your dealings with Mr. Pell which you have testified to, was Mr. Claassen's name mentioned to you by him as interested in them at all?

A. I do not recollect of its ever having been mentioned.

Q. When did you first know Mr. Simmons pro-
78 posed to purchase the controlling interest in the 5th National Bank?

A. A couple of days before it transpired, about the 20th.

Witness overheard a conversation in Mr. Pell's office between Mr. Pell and Mr. Simmons. Another party was there whom he did not know. Did not see Mr. Claassen there. Does not think he heard his name mentioned as among the prospective purchasers of the bank.

79 Witness then identifies each one of the checks offered in evidence by the prosecution as set out above, and says in regard to each one separately and specifically that while it was in his possession, or before it came into his possession, he had no interview at all with Mr. Claassen concernlng it. Mr. Claassen never saw it in his possession, and never saw it prior to its going into his possession.

Q. Was any of the money which you received which you have testified to, or any of the proceeds
80 of these checks, paid to Mr. Claassen by you?

A. No, sir.

Q. Did you have any connection, remote or direct, with Mr. Claassen in this whole series of transactions in regard to these bonds that you have testified to?

A. No, sir.

Q. Did not see him with regard to it?

A. No, sir. 81

Q. Or talk with him in regard to it?

A. No, sir.

Q. Nor did he know, so far as you know, what you and Pell were doing?

A. No, sir.

The prosecution was allowed to trace through numerous witnesses, no one of whom had any personal connection with Peter J. Claassen, or transaction with him respecting the same. what became of 622 bonds of the par value of $1,000 each, delivered 82 by Claassen to Pell, for sale on the 23d and 24th days of January, 1890, under the following objection, namely:

"It is agreed that all evidence as to any transactions in regard to these bonds, subsequent to the giving of the receipt for them, and their delivery to Pell, Wallack & Co. for sale, to be considered as taken under the objection on the part of the defendant without specifying the objection to each question." 83

3. Charles E. Wallack, having been called as a witness by the prosecution, and having testified that he was President of the Lenox Hill Bank, and of Pell, Wallack & Company, and it having been already proven that on the morning of the 22d day of January, 1890, there was left with the Third National Bank in the City of New York (for the purpose of procuring from it its two checks, namely, one to the order of Pell, Wallack & Co., for $150,000, and one to the order of James A. Simmons, for 84 $150,000, which checks were delivered to Mr. Leland in payment of the stock), the following certified checks on the Lenox Hill Bank, namely William M. Kilduff, $50,000; Pell, Wallack & Co., $50,000; J. K. Watson, $50,000, James A. Simmons, $50,000; but no testimony having yet been given as to knowledge on the part of Peter J. Claassen of the accounts of

85 said parties with said Lenox Hill Bank, the following questions were asked:

Q. Will you please say what, if any, instructions you gave your paying teller after he handed you these checks?

A. I told him to certiy them.

Q. Was the account of William M. Kilduff with your bank on January 22d, when you gave the order to certify, good for $50,000?

Objected to.

86

A. At that time in the morning?

Q. At that time?

Objected to as immaterial, incompetent and not connected with the defendant.

Objection overruled. Exception by defendant.

A. At that time in the morning—no.

Q. Was the account of Pell, Wallack & Co., at
87 your bank, at the time you gave this order to certify, good for $50,000?

Same objection, ruling and exception.

A. No, sir.

Q. Was the account of J. K. Watson with your bank good for $50,000 at the time you gave that order?

Same objection, ruling and exception.

88 Q. Do you recognize those checks as the ones which were directed by you to be certified (handing witness checks)?

A. I do.

Counsel for plaintiff offers in evidence the checks above referred to.

Same objection.

Q. J. K. Watson had an account at your bank? 89

A. He did.

Q. And Pell, Wallack & Co., had an account there?

A. Yes, sir.

Q And William M. Kilduff?

A. And William M. Kilduff, yes, sir.

The objection to the admission of the checks is overruled, and counsel for defendants excepts.

The three checks are marked in evidence. 90

On cross-examination of this witness, witness testified that he never had any business transactions with Mr. Claassen. He never saw him at the Lenox Hill Bank. He never notified him prior to the 24th day of January that Mr. George H. Pell was not a member of his firm; in the transactions which he has testified to as to the checks, he had no transaction or communication with Mr. Claassen; Mr. Pell was at one time a member of his firm 91 about three years before, and had been prior to that time for some twelve years, and his name still remained upon the signs of their place of business, which was Pell, Wallack & Co.

4. Charles E. Wallack, the president of the Lenox Hill Bank, and who had been such for more than a year prior to the transactions in question, was asked:

Q. Do you know the value of the Lenox Hill 92 Bank stock on January 22d, 1890?

A. I know about.

Q. What was it worth per share?

Objected to on the ground that it does not appear that the witness is qualified to testify on the subject.

Q. Was it quoted in the market?

93 A. No, it was not at that time.

Q. Do you know its value by sales?

A. I only know what was offered for it.

Q. You know what it was offered for?

A. I know what was offered for it.

Q. Will you state what was offered for it on or about the 22nd?

Objected to on the ground that what was offered for a man's property is not the best evidence of value; and second, that the bank
94 stock of the Lenox Hill Bank was not received until the 27th of January.

THE COURT: I think the best way to get at the value of it would be from the statement of the bank. The objection is sustained. Exception.

Q. You have testified that Mr. James A. Simmons bought a certain number of shares—the controlling stock, 505 shares?

A. Yes, sir.

95 Q. Will you state, if you know, what Mr. Simmons paid per share?

Objected to on the ground that the transaction referred to took place on the 9th of December, and is therefore too remote.

Objection sustained. Exception by defendant.

Q. Do you know of any sales of stock of this
96 bank on or about the 22d of January or in the month of January?

A. I do not.

5. William M. Kilduff, a member of the firm of Pell, Wallack & Co., having testified to the signing of checks with the name of the payee blank, identifies a check of $15,000, made to the order of Peter J. Claassen and testified that the payee's

name was in the handwriting of Pell, and says it 97
was not made at Claassen's request, but at Pell's.

Q. You did not owe Claassen anything?

A. We didn't owe him anything, and he didn't owe us anything.

Q. At whose request did you do this?

A. At Pell's.

MR. TENNEY: I understand that this evidence is all taken subject to the objection that I made.

THE COURT: Yes, I admitted it on the ground that as the evidence stands the question will be 98
submitted to the jury, whether or not there was a combination, an agreement between Mr. Claassen and Mr. Pell, and Mr. Simmons, that the moneys of this bank, the proceeds of those 622 bonds, should be applied to paying Leland; and if the jury are satisfied that there was a combination or agreement of that kind, then of course this is all material.

MR. TENNEY: The point I make is that it was in the absence of Mr. Claassen, and the further point that he is on trial here individually, and not as a 99
conspirator.

THE COURT: Of course; still the rules would be the same. If the jury finds that he conspired with Pell and Simmons to take the money of this bank to pay the debt of Simmons to Leland by a check, then this is material in my opinion, notwithstanding the fact that he is not indicted under the conspiracy statute, but is indicted for allowing the money to go that way.

MR. TENNEY: I have not filed objections con- 100
stantly, but there is an understaning that whatever evidence is given here in the absence of Mr. Claassen, I am to have the benefit of an objection at the time.

THE COURT: You have had a general statement and I give you now the grounds, and you see the grounds yourself, of course.

Exception.

101 6. Mr. Colson, the cashier of the 6th National Bank, having testified in regard to the making of the three collateral notes of $60,000 each on the 27th day of January, and the attaching of the securities thereto, namely, Equitable Bank stock and Lenox Hill Bank stock, was asked these questions:

Q. Do you know yourself what the standing of the Lenox Hill Bank was on January 22, 1890?

A. I do not.

Q. Nor the Equitable?

102 A. Nor the Equitable.

Q. Nor the value of the stock?

A. I do not. I have not the slightest idea.

Q. Do you know anything to the detriment of either bank at that time?

A. No, not specially.

Q. They were banks doing business in this city; you know that?

A. Yes, sir.

Q. You knew nothing to their discredit?

103 A. I knew nothing to their discredit; no, sir.

Q. Have the three $60,000 notes been paid?

Objected to as immaterial. Ojection sustained. Exception.

Q. Do you know where the collaterals are that were attached to those three $60,000 notes?

A. I do not.

Q. Do you know what became of them?

A. I do not know what became of them.

104 Q. You don't know whether they are in the bank yet, or not, do you?

Objected to. Objection sustained. Exception.

7.—At the close of the evidence for the prosecution, there being 46 counts to the indictment, counsel for defendant moves that the plaintiff be di-

rected to elect which of the counts they choose to rely upon. 105

The Court states that the motion will be granted, if made when the testimony is closed, but will not be granted at this stage of the case.

Exception.

8.—At the close of the evidence for the prosecution, counsel for defendant moves to strike out all the evidence relating to the three loans of $60,000 each, made on the 22d day of January, 1890, on the ground that the collaterals given or pledged with those loans, or for those loans, have not been produced in Court. 106

Motion denied. Exception noted by defendant.

9.—Counsel for defendant moves that the Court direct an acbuittal.

Motion denied. Exception by defendant. 107

10.—To the following words in the charge of the Judge, namely:

"Here I should say that it is not a question of restitution after the doing of the act, but of the act done by the accused on the 22nd. On the 27th, the money having passed out of the bank on the 22nd, notes were given and collateral was given as it would seem, but it cannot be said that because the bank subsequently availed itself of those collaterals therefore there was no misapplication of the bank's money on the 22nd. So the question is not whether the bank saved itself finally, but whether or not on the 22nd, when this defendant caused the $60,000 cashier's check to be given to Simmons he applied the money of the bank to the use of Simmons. Restitution afterward, or the fact that the bank got collaterals afterward, does not affect the question of his criminality in doing the act done on the 22nd." 108

Exception.

109 11.—To the language of the Judge's charge as follows:

"One who has reason to believe that a fact exists knows that it exists."

Exception.

12.—To the language of the Judge's charge as follows:

"I must remark further to you that Simmons is
110 not called to corroborate him as to these dealings and sayings between him and Simmons, nor is his absence accounted for; and it is a rule that where a man fails to put a witness on the stand who is at hand and can be produced, it is a fair presumption that if produced he would not corroborate him. That rule should be noticed here because to a large degree the statement of the defendant is of transactions and sayings between him and Simmons, and Simmons if on the stand would say 'I said so and
111 so,' as he says, or 'I did not say so and so,' as he says; but Simmons is not called."

Exception.

13.—To the following request to charge:

"I ask your Honor to instruct the jury that they must find that the defendant knew that Simmons intended to use the funds to meet his checks given to Leland before they can convict him on the point charged."

112 THE COURT: I have charged on that subject. I do not care to repeat.

Exception.

And the said Peter J. Claassen prays that the judgment, conviction and sentence aforesaid may be reversed, annulled and altogether held for

naught, and he may be restored to all things which 113
he had lost by occasion of the said conviction, judgment and sentence.

HECTOR M. HITCHINGS,
Attorney for Plaintiff in Error,
Office and Post Office Address,
132 Nassau Street, N. Y. City.

Exhibit II.

114

UNITED STATES CIRCUIT COURT,

SOUTHERN DISTRICT OF NEW YORK.

THE UNITED STATES
AGAINST
PETER J. CLAASSEN.

115

The defendant was indicted, tried and convicted under Section 5209, U. S. Revised Statutes.

The counts of the indictment upon which a verdict of guilty was rendered are the following:

FIRST COUNT.

"The jurors of the United States of America within and for the District and Circuit aforesaid on their oath present that Peter J. Claassen, late of the City and County of New York, in the District and Circuit aforesaid, yeoman, heretofore, to wit, on the twenty-third day of January, in the year of our Lord one thousand eight hundred and ninety, at the Southern District of New York, and within the jurisdiction of this Court, he, the said Peter J. Claassen, being then and there the President of a

116

117 certain National Banking Association, then and there known and designated as the Sixth National Bank of the City of New York, which said association had been theretofore created and organized under and by virtue of an Act of Congress entitled "An Act to provide a national currency secured by a pledge of United States bonds and to provide for the circulation and redemption thereof," approved June third, in the year of our Lord, one thousand eight hundred and sixty-four, and which said as-
118 sociation was then and there acting and carrying on a banking business at the City of New York, in the said district, under the said Act of Congress, and acts amendatory thereof, *did by virtue of his said office and employment and while he was so employed and acting* as such president as aforesaid, receive and take into his possession certain funds and credits, to wit:

Ten bonds and written obligations of the Saint Louis and San Francisco Railway Company of the
119 kind called general mortgage bonds of the denomination and value of one thousand dollars each.

Thirty-one bonds and written obligations of the New York Elevated Railway Company of the kind called first mortgage bonds of the denomination and value of one thousand dollars each.

Fifteen bonds and written obligations of the Canada Southern Railway Company of the kind called first mortgage bonds of the denomination and value of one thousand dollars each.

120 Twenty bonds and written obligations of the Chicago, Milwaukee and Saint Paul Railway Company of the kind called terminal bonds of denomination and value of one thousand dollars each.

Twenty bonds and written obligations of the Chicago, Milwaukee and Saint Paul Railway Company of the kind called consolidated bonds of the

denomination and value of one thousand dollars each. 121

Thirty bonds and written obligations of the Milwaukee and Saint Paul Railway Company of the kind called consolidated bonds of the denomination and value of one thousand dollars each.

Ten bonds and written obligations of the Milwaukee and Saint Paul Railway Company of the kind called La Crosse division bonds of the denomination and value of one thousand dollars each.

Ten bonds and written obligations of the Spokane Falls and Northern Railroad of the kind called first mortgage bonds of the denomination and value of one thousand dollars each. 122

Sixty bonds and written obligations of the Union Pacific Railway Company of the kind called first mortgage bonds of the denomination and value of one thousand dollars each.

Fifty-five bonds and written obligations of the Metropolitan Elevated Railway Company of the kind called first mortgage bonds of the denomination and value of one thousand dollars each. 123

Fifteen bonds and written obligations of the Central Pacific Railway Company of the kind called first mortgage bonds of the denomination and value of one thousand dollars each.

Forty-six bonds and written obligations of the Union Pacific Railway Company of the kind called collateral trust bonds of the denomination and value of one thousand dollars each.

Ten bonds and written obligations of the Cœur de Alene Railway Company and Navigation Company of the kind called general first mortgage bonds of the denomination and value of one thousand dollars each. 124

Ten bonds and written obligations of the Saint Paul and Sioux City Railroad of the kind called

first mortgage bonds of the denomination and value of one thousand dollars each.

Twenty-five bonds and written obligations of the Central Pacific Railway, San Joaquin Railroad Company, of the kind called first mortgage bonds of the denomination and value of one thousand dollars each.

Ten bonds and written obligations of the Saint Paul, Minneapolis and Manitoba Railway Company of the kind called second mortgage bonds of the de-
nomination and value of one thousand dollars each.

Twenty-five bonds and written obligations of the Chicago, Burlington and Quincy Railroad Company of the kind called sinking fund bonds of the denomination and value of one thousand dollars each.

Forty-six bonds and written obligations of the Chicago and Northwestern Railway Company of the kind called debenture bonds of the denomina-
tion and value of one thousand dollars each.

Sixty bonds and written obligations of the Chicago, Burlington and Quincy Railroad Company of the kind called debenture bonds of the denomination and value of one thousand dollars each.

Ten bonds and written obligations of the Lake Shore and Michigan Southern Railway Company of the kind called second mortgage bonds of the denomination and value of one thousand dollars each.

Ten bonds and written obligations of the Chicago and Northwestern Railway Company of the kind called gold first mortgage bonds of the denomination and value of one thousand dollars each.

Ten bonds and written obligations of the New York, Lake Erie and Western Railway Company of the kind called funded bonds of the denomination and value of one thousand dollars each.

Ten bonds and written obligations of the Chicago, 129
Saint Paul, Minneapolis and Omaha Railway Company of the kind called second mortgage bonds of the denomination and value of one thousand dollars each.

Five bonds and written obligations of the Burlington, Cedar Rapids and Northern Railway Company of the kind called first mortgage bonds of the denomination and value of one thousand dollars each.

Four bonds and written obligations of the Texas 130
Pacific Railway Company of the kind called second mortgage bonds of the denomination and value of one thousand dollars each.

Forty-five bonds and written obligations of the Oregon Short Line Railway Company of the kind called first mortgage bonds, of the denomination and value of one thousand dollars each.

Ten bonds and written obligations of the Louisville, New Albany and Chicago Railway Company, of the kind called first mortgage bonds, of the de- 131
nomination and value of one thousand dollars each.

Ten bonds and written obligations of the Richmond and West Point Terminal Railway and Warehouse Company, of the kind called consolidated first mortgage gold trust bonds, of the denomination and value of one thousand dollars each, then and there being the property of the said association, and which he held for and in the name and on account of the said association, *and did then and there willfully and unlawfully*, and with intent to 132
injure and defraud the said association, *embezzle* the said bonds and written obligations, and *convert them to his own use*, against the peace of the United States and their dignity, and contrary to the form of the Statute of the United States in such case made and provided.

133

NINETEENTH COUNT.

And the jurors aforesaid, on their oath aforesaid, do further present, that Peter J. Claassen, late of the city and county of New York, in the District and Circuit aforesaid, yeoman, heretofore, to-wit, on the twenty second day of January, in the year of our Lord one thousand eight hundred and ninety, at the Southern District of New York, and within the
134 jurisdiction of this Court, *being then and there the President* of a certain National Banking Association, then and there known and designated as the Sixth National Bank of the city of New York, which said association had been theretofore created and organized under and by virtue of an Act of Congress entitled "An act to provide a national currency secured by a pledge of United States bonds, and to provide for the circulation and redemption thereof," approved June third, in the
135 year of our Lord one thousand eight hundred and sixty-four, and which said association was then and there acting and carrying on a banking business at the city of New York, in the said district, under the said Act of Congress, and acts amendatory thereof, *did wilfully and unlawfully, and with intent to injure and defraud* the said association, misapply and convert to the use, benefit and advantage of one James A. Simmons, certain moneys and funds then and there being the property of the said
136 association, to wit, the sum of sixty thousand dollars, in the manner and by the means following, that is to say: He, the said Peter J. Claassen, being then and there such president as aforesaid, did, *without the knowledge and consent of said association, or its board of directors*, procure the making by one Andrew E. Colson, who was then and there the cashier of said association, of a certain writing and check, commonly known and called

a cashier's check, bearing date the twenty-second 137
day of January, in the year of our Lord one thousand eight hundred and ninety, which said check did then and there authorize and direct the said association to pay to the order of the said James A. Simmons the sum of sixty thousand dollars, although, as he, the said Peter J. Claassen, then and there well knew, the said sum of sixty thousand dollars was not then and there on deposit with the said association to the credit of him, the said James A. Simmons, and was not then 138
and there due and owing from the said association to him, the said James A. Simmons, and the re-payment thereof to the said association was not then and there in any way secured, and the said James A. Simmons had no manner of right and title to the same, and he, the said Peter J. Claassen, then and there unlawfully devising and intending that he, the said James A. Simmons, should appropriate and convert to his own use the said sum of sixty thousand dollars from and out 139
of the moneys and funds of the said association, which said sum of money was, upon and pursuant to the direction and authorization contained in the said check, thereafter, to wit, on the twenty-third day of January, in the year of our Lord one thousand eight hundred and ninety, paid by the said association from and out of the moneys and funds of the said association to the said James A. Simmons and was then and there appropriated and converted to the use of the said James A. Simmons 140
against the peace of the United States and their dignity, and contrary to the form of the Statute of the said United States in such case made and provided.

141

TWENTY-FIRST COUNT.

And the jurors aforesaid, on their oath aforesaid, do further present, that Peter J. Claassen, late of the City and County of New York, in the District and Circuit aforesaid, yeoman, heretofore, to wit, on the twenty-second day of January in the year of our Lord one thousand eight hundred and ninety, at the Southern District of New York, and within the jurisdiction of this Court, being then and there
142 the president of a certain National Banking Association then and there known and designated as the Sixth National Bank of the City of New York, which said association had been theretofore created and organized under and by virtue of an Act of Congress entitled "An Act to provide a national currency secured by a pledge of United States bonds and to provide for the circulation and redemption thereof," approved June third, in the year of our Lord one thousand eight hundred and
143 sixty-four, and which said association was then and there acting and carrying on a banking business at the City of New York in the said district, under the said Act of Congress, and acts amendatory thereof, did wilfully and unlawfully, and with intent to injure and defraud the said association, misapply and convert to the use, benefit and advantage of a certain copartnership composed of William M. Kilduff and Charles E. Wallack, then and there carrying on business under the name and
144 style of Pell, Wallack and Company, certain moneys and funds then and there being the property of the said association, to wit, the sum of sixty thousand dollars, in the manner and by the means following, that is to say: He, the said Peter J. Claassen, being then and there such president as aforesaid, did, without the knowledge and consent of said association, or its Board of Directors, pro-

cure the making by one Andrew E. Colson, who 145
was then and there the cashier of said association,
of a certain writing and check commonly known
and called a cashier's check, bearing date the
twenty-second day of January, in the year of our
Lord one thousand eight hundred and ninety, which
said check did then and there authorize and direct
the said association to pay to the order of the said
copartnership the sum of sixty thousand dollars,
although, as he, the said Peter J. Claassen, then and
there well knew, the said sum of sixty thou- 146
sand dollars was not then and there on deposit with
the said association to the credit of the said copart-
nership; and was not then and there due and owing
from said association to the said copartnership, and
the repayment thereof to the said association was
not then and there in any way secured, and the said
copartnership had no manner of right and title to
the same, and he, the said Peter J. Claassen, then
and there unlawfully devising and intending that
the said copartnership should appropriate and con- 147
vert to its own use the said sum of sixty thousand
dollars from and out of the moneys and funds of
the said association, which said sum of money was,
upon and pursuant to the direction and authoriza-
tion contained in said check, thereafter, to wit, on
the twenty-third day of January, in the year of our
Lord one thousand eight hundred and ninety, paid
by the said association from and out of the moneys
and funds of the said association to the said
copartnership, and was then and there appropriated 148
and converted to the use of the said copartnership
against the peace of the United States and their
dignity, and contrary to the form of the Statute of
the said United States, in such case made and
provided.

149

TWENTY-THIRD COUNT.

And the Jurors aforesaid, on their oath aforesaid, do further present, that Peter J. Claassen, late of the City and County of New York, in the District and Circuit aforesaid, yeoman, heretofore, to wit: on the twenty-second day of January, in the year of our Lord one thousand eight hundred and ninety, at the Southern District of New York, and within the jurisdiction of this Court, being then and there
150 the President of a certain National Banking Association then and there known and designated as the Sixth National Bank of the City of New York, which said Association had been theretofore created and organized under and by virtue of an Act of Congress entitled, "An Act to provide a national currency secured by a pledge of United States bonds, and to provide for the circulation and redemption thereof," approved June 3d, in the year of our Lord one thousand eight hundred and
151 sixty-four, and which said Association was then and there acting and carrying on a banking business at the City of New York in the said district, under the said Act of Congress, and acts amendatory thereof, did willfully and unlawfully, and with intent to injure and defraud the said Association, misapply and convert to the use, benefit and advantage of a certain copartnership, composed of John Satterlee and James A Simmons, then and there carrying on business under the name and style of
152 John Satterlee & Company, certain moneys and funds then and there being the property of said Association, to wit: the sum of sixty thousand dollars, in the manner and by the means following, that is to say, he, the said Peter J. Claassen, being then and there such president as aforesaid, did, without the knowledge and consent of said Association, or its board of directors, procure the making by one

Andrew E. Colson, who was then and there the 153
cashier of said Association, of a certain writing and
check, commonly known and called a cashier's
check, bearing date the twenty-second day of Jan-
uary, in the year of our Lord one thousand eight
hundred and ninety, which said check did then
and there authorize and direct the said Association
to pay to the order of the said copartnership the
sum of sixty thousand dollars, although, as he, the
said Peter J. Claassen, then and there well knew,
the said sum of sixty thousand dollars was not then 154
and there on deposit with the said Association to
the credit of said copartnership, and was not then
and there due and owing from said Association to
the said copartnership, and the repayment thereof
to the said Association was not then and there in
any way secured; and the said copartnership had
no manner of right and title to the same, and he,
the Peter J. Claassen, then and there unlawfully
devising and intending that the said copartnership
should appropriate and convert to its own use the 155
said sum of sixty thousand dollars from and out of
the moneys and funds of the said Association, which
said sum of money was, upon and pursuant to the
direction and authorization contained in said check,
thereafter, to wit, on the twenty-third day of Jan-
uary, in the year of our Lord one thousand eight
hundred and ninety, paid by the said Association
from and out of the moneys and funds of the said
Association to the said copartnership, and was then
and there appropriated and converted to the use of 156
the said copartnership against the peace of the
United States and their dignity, and contrary to
the form of the statute of the said United States in
such case made and provided.

165 the said sum of two hundred and seven thousand eight hundred dollars, so paid as aforesaid, had not been deposited, and was not then on deposit, with the said Sixth National Bank of the City of New York, by the said Lenox Hill Bank, and was not then and there due and owing from the said Sixth National Bank of the City of New York to the said Lenox Hill Bank, and the repayment thereof to the said Sixth National Bank of the City of New York was not then and there in any way se-
166 cured, and the said Lenox Hill Bank had no manner of right or title to the same, against the peace of the United States and their dignity, and contrary to the form of the statute of the said United States in such case made and provided.

In the course of the trial, ANDREW E. COLSON, a witness called by the prosecution, among other
167 things testified as follows:

On the 22d of January, 1890, I was cashier of the Sixth National Bank of New York. It was my duty to attend the meetings of the Board of Directors as secretary, and as such I attended a meeting on the 22d of January. Charles H. Leland, J. G. Doubleday and C. Frothingham were present. The resignation as director of William J. Quinlan was offered. On motion of Mr. C. Frothingham, his resignation was accepted. On motion of Mr. J.
168 G. Doubleday, Mr. P. J. Claassen was nominated and elected a director. Mr. Claassen took his seat as a director. The written resignation of Mr. C. F. Leland was offered. On motion of Mr. C. H. Leland it was accepted. On motion of Mr. P. J. Claassen, Mr. D. M. Ripley was nominated and elected a director. Mr. Riply came in and took his seat. Mr. C. Frothingham offered his resignation.

On motion of Mr. C. H. Leland it was accepted. 169
P. J. Claassen nominated Mr. Kenneth Watson as director and he was elected. Mr. J. G. Doubleday offered his resignation as director and it was accepted. On motion of Mr. P. J. Claassen, Mr. H. T. Cutter was nominated and elected a director. I understand he was not present. Mr. C. H. Leland offered his resignation as director, and it was accepted. On motion of Mr. P. J. Claassen, Mr. James Jourdan was nominated and elected a director. On motion the meeting adjourned. 170

About ten minutes afterward on the same day another meeting was held, at which I was present, and of the proceedings at which I took a minute. Mr. P. J. Claassen, Mr. D. M. Ripley, Mr. J. Kenneth Watson were present. On motion of Mr. D. Ripley, Mr. P. J. Claassen was nominated and elected President. The meeting then adjourned.

The witness identified six certificates of stock of the Sixth National Bank, bearing the signatures of C. H. Leland, President, and A. E. Colson, Cashier, 171
issued on the 22d of January, 1890, as follows: One to P. J. Claassen for ten shares; one to J. Kenneth Watson for ten shares; one to D. M. Ripley for ten shares; one to H. T. Cutter for ten shares; one to James Jourdan for ten shares; one to James A. Simmons for 985½ shares. The certificates were put in evidence. There were also put in evidence ten other certificates of stock, made out by the witness pursuant to instructions from Mr. Claassen, all dated on the 25th of January, 1890, signed P. J. 172
Claassen, president, and A. E. Colson, cashier, two of the certificates for one hundred shares each standing in the name of P. J. Claassen, the others all standing in the name of James A. Simmons, which certificates were issued in lieu of and upon the surrender of 985½ shares before mentioned.

By direction of P. J. Claassen, written notice was

given to each of the banks in the Clearing House Association that on and after the 23d day of January, checks and drafts drawn on the Lenox Hill Bank would be redeemed by the Sixth National Bank.

The election of P. J. Claassen as President of the Sixth National Bank, was announced (by the cashier) to the other banks in the City of New York by a circular letter, as follows:

P. J. CLAASSEN,
President.
A. E. COLSON,
Cashier.
G. W. PANCOAST,
Assistant Cashier.

SIXTH NATIONAL BANK.

NEW YORK, January 22, 1890.

At a meeting of the Board of Directors of this Bank, held this day, Mr. P. J. CLAASSEN was elected President in place of Mr. CHAS. H. LELAND, resigned.

A. E. COLSON, Cashier.

Signature: P. J. CLAASSEN.

Claassen assumed to act, and did act, continuously as President of the Bank from January 22d to January 29th, inclusive. On January 29th, the Bank was closed by Alonzo B. Hepburn, United States Bank Examiner.

CHARLES H. LELAND, a witness called for the prosecution, among other things, testified as follows:

I was President of the Sixth National Bank on the 22d of January, 1890, having been first elected on the 3d of December, 1883. On the 22d of Janu-

ary a meeting of directors was held. Each re- 177
signed successively, and as they resigned one by one, a new board were one by one elected. Immediately before the acceptance of our resignations, Mr. Frothingham, Mr. Doubleday, Mr. C. F. Leland, and myself transferred all the stock that we respectively owned. From that time to the 29th of January, 1890, neither of us owned any stock of the Bank.

On the 23d of January I met Mr. Claassen at the
deposit vault of the Park Bank. Frederick A. 178
Smith and John G. Doubleday were present. We went down together from the main room to the vaults, and I conducted them to one of the small rooms which are provided for the convenience of box-holders. I then went to the strong box belonging to the Sixth National Bank, in the inner safe of the Park Bank vault, opened it and took out two of the tin boxes which contained a portion of the bonds of the bank. I then locked up the safe and
went into the room where I had left these gentle- 179
men, and there the bonds were taken out from the package and counted in the presence of Mr. Claassen, separately, one by one; and as a package was counted and found correct in accordance with the list which had been furnished me by the keeper of the general ledger in the bank and the assistant cashier, it was checked off by Mr. Claassen, Mr. Claassen checking as I counted. The same course was pursued with the other two boxes until the
bonds were all counted over and found to be cor- 180
rect. Then Mr. Claassen signed the list, as having received those bonds, receipted for them. At the same time I delivered to Mr. Claassen and he received one of the keys, the President's key, to the strong box containing the bonds.

The list was identified by the witness and offered in evidence.

181 The defendant objected on the ground that it has not been made to appear that Peter J. Claassen was elected President of the Bank by any competent Bord of Directors qualified as the law requires, and that any transactions as an individual not designated or elected an agent or officer of the bank, are not within the jurisdiction of this Court.

The objection was overruled and the defendant excepted. The list was received, and includes, among others, the bonds described in the first count
182 of the indictment. The receipt is as follows:

"N. Y., Jany. 23/90.

"Recd. the above enumerated bonds and stock for the Sixth National Bank. P. J. Claassen, Prest."

Evidence was then given by the prosecution that the defendant, within half an hour after the election of the new Board of Directors and his election as President, directed the cashier to draw three checks for $60,000 each, one to the order of James
183 A. Simmons, one to the order of Pell, Wallack & Company and one to the order of John Satterlee & Company. No collaterals were furnished for these checks until the 27th of January. The checks were all given for the benefit of Simmons, and were used to pay other checks which had been given Leland in part payment for the stock that Simmons had purchased of Leland.

On the 23d of January the defendant, acting as President, took from the Park Bank vaults two
184 hundred and sixty bonds, the property of the Sixth National Bank, and delivered them to Pell; and on the 24th he took three hundred and sixty two more bonds and delivered them to Pell, receiving a receipt therefor, as follows:

"Received New York, January 23, 1890, of the Sixth National Bank, New York, the following-named bonds to be sold for account of said bank, and accounted for to its president as he may de-

mand," specifying the bonds, and signed Pell, 185
Wallack & Co.

The defendant did this at the request of Simmons, and he knew Pell was the financial agent of Simmons. These bonds were all sold, or used as collateral by Pell, and the money obtained was used to pay checks which had been given Leland in payment for the stock that Simmons purchased of Leland. The jury, under the charge of the Court, found that the giving of the sixty thousand dollar checks, and the giving of the bonds to Pell, and the 186
use made of the checks, and the money realized on the bonds, was with the knowledge of the defendant, and the result of an arrangement between Claassen, Simmons and Pell.

It is admitted upon the record that the oath prescribed by Section 5147, U. S. Revised Statutes, was not taken by either Claassen, Ripley, Watson, Cutter or Jourdan prior to January 30, 1890.

Counsel for defendant requested the Court to instruct the jury as follows: 187

I.

The persons elected as directors of the Sixth National Bank on the 22d day of Janvary, 1890, hhad no power to elect a president or constitute an agent of the bank until they had taken the oath prescribed by statute.

II.

188

The election of the defendant as president of the Sixth National Bank not having been made by a legally qualified Board of Directors, was of no effect, and the defendant was not thereby president of the bank and liable to the provisions of Section 5209 R. S.

189 III.

The defendant not having qualified as a director of the Sixth National Bank on the 22d day of January, 1890, was not eligible as president of the bank.

The Court refused so to instruct, to which refusal the defence excepted.

Settled as above by consent, and argument to be
190 heard at October term.

July 9, 1890.

CHAS. L. BENEDICT.

Endorsed: The United States *vs.* Classen. Printed case as settled. File mark, U. S. Circuit Court. July 9, 1890. John A. Shields, Clerk.

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191 **Exhibit III.**

UNITED STATES OF AMERICA, ss.:

The President of the United States, to the Judges of the Circuit Court of the United States, for the Southern District of New York, Greeting:

Because, in the records and proceedings and also in the rendition of a judgment of a plea which is in the said Circuit Court before you, between the United States of America, plaintiff, and Peter J.
192 Claassen, defendant, a manifest error hath happened to the great damage of the said Peter J. Claassen, as by his complaint appears. We being willing that the error, if any hath been, should be duly corrected and full and speedy justice done to the party afore said in this behalf, do command you, if judgment be therein given, that under your seal, distinctly and openly, you send the record and proceedings

aforesaid with all things concerning the same, to 193
the Supreme Court of the United States, together with this writ, so that you may have the same at Washington, on the second Monday of April, eighteen hundred and ninety-one, in the said Supreme Court, to be then and there held that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done thereon to correct that error, what of right and according to the laws and customs of the United States should be done. 194

Witness, the Honorable MELVIN W. FULLER, Chief Justice of the said Supreme Court, the 21st day of March, in the year of our Lord one thousand eight hundred and ninety-one.

[Signed.] JAMES A. MCKENNEY,
Clerk of the Supreme Court
[SEAL.] Of the United States.

The foregoing writ is hereby allowed. March 21, 1891. 195

[Signed.] SAM'L BLATCHFORD,
Associate Justice of the Supreme Court of the United States.

This writ is to operate as a supersedeas and stay of execution with leave to the United States to move the Supreme Court of the United States on notice to vacate the stay as having been granted without authority of law.

[Signed.] SAM'L BLATCHFORD,
Associate Justice of the Supreme 196
Court of the United States.

197

Exhibit IV.

SUPREME COURT OF THE UNITED STATES.

PETER J. CLAASSEN, Plaintiff in Error, AGAINST 198 THE UNITED STATES OF AMERICA, Defendant in Error.	Joinder in Error.

And afterwards, to wit, on the second Monday of April, in said term, the said defendant in error by Edward Mitchell their attorney comes here into Court and says there is no error either in the record or proceedings aforesaid, or in the giving of the judgment aforesaid.

199 And he prays that the said Supreme Court, before the Justices thereof, now here, may proceed to examine as well the record and proceedings aforesaid as the matters aforesaid above assigned for error, and that the judgment aforesaid, in form aforesaid given, may be in all things affirmed, &c.

EDWARD MITCHELL,
Attorney for Defendant in Error.

200

201

Exhibit V.

Wednesday, May 28th, 1890.

The Court meets pursuant to adjournment, and is opened by proclamation.

Present: Hon. Charles L. Benedict, Judge.

The United States
vs.
Peter J. Claassen.

202

The above cause being still on trial, the jurors are called and severally answer to their names.

Mr. Mitchell, U. S. Attorney, concludes his summing up in behalf of the prosecution. 203

Charge is thereupon given by the Court to the jury, who retire under charge of an officer duly qualified to attend them, and on their return they say that they find the defendant guilty of the offenses charged in the 19th, 21st, 23rd, 1st and 25th counts of the indictment, and they say that they find him not guilty as to the 43rd, 9th, 11th, 29th, 31st and 33rd counts of the indictment, and so say they all. 204

And, on motion of defendant's counsel, being polled, they severally say that that is their verdict, and so say they all.

Ordered that the prisoner be remanded to the custody of the U. S. Marshal.

205 Notice of motion for leave to make motion for new trial, and in arrest of judgment given by counsel for defendant under the rule.

Adjourned to Thursday, May 29, 1890, at 11 o'clock, A. M.

FRIDAY, October 24th, 1890.

206 The Court meets pursuant to adjournment and is opened by proclamation.

The Court in Banc, meets pursuant to rule.

Present—HON. WILLIAM J. WALLACE, Circuit Judge.

HONS. CHARLES L. BENEDICT and ADDISON BROWN, JJ.

THE UNITED STATES

207 vs.

PETER J. CLAASSEN.

The above cause coming on for argument, on motion for a new trial and in arrest of judgment Mr. Benjamin B. Foster is heard in behalf of defendant.

Mr. EDWARD MITCHELL, U. S. Attorney, is heard in opposition

208 Mr. A. W. TENNEY is heard in support of motion and in behalf of defendant.

C. A. V.

Court adjourned to Monday, October 27th, 1890, at 11 o'clock A. M.

209

THE UNITED STATES

vs.

PETER J. CLAASSEN.

FRIDAY, October 24th, 1890.

Before HONS. WILLIAM J. WALLACE, Circuit Judge,
and CHARLES L. BENEDICT, and ADDISON BROWN, JJ. 210

Defendant moves to postpone the argument of the motion for new trial and arrest of judgment and for leave to make and file a new case with new exceptions.

Mr. JOHN D. TOWNSEND is heard in support of motion,

Mr. EDWARD MITCHELL, United States Attorney, opposed.

Motion denied by the Court. 211

212

213 Wednesday, March 18th, 1891.

The Court meets pursuant to adjournment, and is opened by proclamation.

Present: Hon. Charles L. Benedict, Judge.

The United States vs. 214 Peter J. Claassen.	§ 5209. Embezzling, abstracting and misapplying the funds of a National Bank and making false entry.

On motion of the United States Attorney Ordered sentence.

The Court thereupon proceeds to pass judgment and sentence the prisoner, Peter J. Claassen, to be imprisoned for the period of six (6) years.

215 Sentence to be executed at the Erie County Penitentiary.

216

SUPPLEMENT TO PETITION.

SUPREME COURT OF THE UNITED STATES.

In the matter of the Petition of PETER J. CLAASSEN for a Writ of Mandamus

against

CHARLES L. BENEDICT, Judge of the Circuit Court, Southern District of New York.

CITY AND COUNTY OF NEW YORK, *ss:*

M. Linn Bruce being duly sworn, says that he is over the age of twenty-one years; that he is a clerk in the office of Hector M. Hitchings, attorney for the petitioner herein; that on the 28th day of April, 1891, he served upon Edward Mitchell, United States District Attorney for the Southern District of New York, a copy of the petition hereto annexed by personally handing to and leaving the same with him personally in his office in the Post-Office Building in the city of New York.

M. LINN BRUCE.

Sworn to before me this 28th day of April, 1891.

EDWARD L. FROST,
Notary Public Queens Co.
Certificate filed in N. Y. Co.

[NOTARY SEAL.]

WASHINGTON, *April 28, 1891.*

EDWARD MITCHELL, Esq.,
District Attorney,
Post Office Building, New York City.

The Supreme Court has appointed Thursday, April thirtieth, to hear argument on petition for writ of mandamus against Judge Benedict; papers will be served to-day and opinion and rules in addition will be printed. This notice given by order of court.

HECTOR M. HITCHINGS,
Attorney for Claassen.

DISTRICT OF COLUMBIA, *ss:*

On this day of April, in the year of our Lord one thousand eight hundred and ninety-one, before me, the subscriber, a notary public in and for the District aforesaid, personally appeared Hector M. Hitchings, and made oath in due form of law that on the 28th day of April, 1891, by the Western Union Telegraph Company, deponent sent to Edward Mitchell, district attorney of the United States for the Southern District of New York, at one thirty p. m., a telegram, of which the foregoing is a true copy; that the address given is the address of said Edward Mitchell.

Subscribed and sworn to before me,

Notary Public.

UNITED STATES CIRCUIT COURT

SOUTHERN DISTRICT OF NEW YORK.

THE UNITED STATES

vs.

PETER J. CLAASSEN.

APRIL 23, 1891.

BENEDICT, J. This is an application on the part of the defendant for a bill of exceptions. A statement of the proceedings had in the case is necessary to an understanding of the questions involved.

The defendant having been indicted for embezzling and misapplying the funds of a national bank of which he was president, was, on the 28th day of May, 1890, found guilty by the jury. During the trial many exceptions were taken by the defendant, which were duly noted. At that time there was no law providing for a writ of error in criminal cases tried in the Circuit Court of the United States. By the rules of the Circuit Court of the Southern District of New York, however, adopted March 12, 1879, provision was made for the correction of any error committed in the trial of a criminal case, by means of a motion for a new trial and in arrest of judgment, to be heard before the three judges authorized by Section 613 of the Revised Statutes to hold the criminal terms of that court, the same to be made upon minutes of the trial to be settled by the judge who tried the case, and filed before the first day of the term next subsequent to the term at which the trial is had. In the present case after the verdict and before judgment minutes of the trial containing some exceptions that have been noted at the trial and omitting others, were presented by the defendant for settlement, and the same were by consent settled and signed by the judge. On the 9th day of July, 1890, a

printed copy of the minutes as settled and signed was filed and thereupon became part of the record. Thereafter, and on the 24th day of October, 1890, the cause came on to be heard before Judges Wallace, Brown, and Benedict in accordance with the rules of 1879 already referred to, when the defendant, then represented by new counsel, applied for an opportunity to procure, to be inserted in the record, exceptions not appearing in the minutes of the trial, as the same had been settled and filed in July previous. This application was denied by the court, and motions for a new trial and for an arrest of judgment were then argued before the three judges upon the record as it stood, and the same were thereafter by them, at the December term, 1890, denied. Thereafter, on the 18th of March, 1891, at the March term, the defendant was sentenced to be imprisoned for a term of six years, and it was then ordered that the sentence be executed in the Erie County Penitentiary. On the 21st day of March, and before the sentence was carried into effect, a writ of error from the Supreme Court of the United States was allowed by Mr. Justice Blatchford, with a direction that the writ of error operate as a supersedeas and a stay of execution, with leave to the United States to move to vacate the stay as having been granted without authority of law. And now, on the 17th of April, 1891, application is made to the judge who tried the cause for his signature to a bill of exceptions containing many exceptions which do not appear in the minutes of the trial on file.

From this statement it will be seen that this application is made after judgment without leave previously obtained—that it is made after writ of error, a supersedeas and a stay of proceedings by a Justice of the Supreme Court of the United States—that the object of the application is to have inserted in the record other exceptions than those now appearing therein; that some eleven months have elapsed since the verdict, and some nine months have elapsed since the minutes of the trial, as presented by the defendant, by

his consent settled and signed by the judge, and made part of the record, and after an application for opportunity to procure the insertion in the record of exceptions other than those appearing in the minutes has been denied by the three judges.

To this application the District Attorney objects upon several grounds. One ground is, that inasmuch as the joint resolution of March 3, 1891, declared that nothing in the statutes of March 3, 1891, creating the Circuit Court of Appeals shall be held or construed in any wise to impair the jurisdiction of any circuit court of the United States in any case now pending before it, or in respect to any case wherein a writ of error or appeal shall have been sued out or taken before the first day of July, 1891, the provisions made in the statute of March 3, 1891, for a writ of error in criminal cases, which in legal effect deprives the circuit courts of the power theretofore possessed to render a final judgment in a criminal case without any appeal, and prevents the circuit courts from carrying into effect any sentence that may have been pronounced by such courts, impair the jurisdiction of the circuit court within the meaning of the joint resolution, and therefore confers no right to a bill of exceptions in this case. This objection, however, the District Attorney declined to argue, for the reason that a writ of error and a stay of proceedings has been issued herein by Mr. Justice Blatchford. For the same reason the objection will receive no further attention on this occasion.

It is further objected by the District Attorney that no application for a bill of exceptions having been made prior to the sentence, nor any leave to make a bill of exceptions having been granted prior to judgment, it is now too late to present a bill of exceptions. In support of this objection reference is made to the rules of this court in criminal cases already referred to, and to Rules 67 and 69 of this court, and also to the cases of Walton *vs.* The United States, 9

Wheaton, 651; Muller *vs.* Ehlers, 91 U. S., 249, ex parte Bradstreet, 4 Peters, 108; Generes *vs.* Bonnemer, 7 Wallace, 564; Chateaugay Iron Co., petitioner, 128 U. S., p. 544 and p. 551.

It is still further objected on the part of the United States that after a writ of error and a supersedeas and a stay has been issued by a Justice of the Supreme Court and filed in this court, this court has no power to open the judgment and allow a bill of exceptions; and reference is made to Draper *vs.* Davis, 102 U. S., 370; Keyser *vs.* Farr, 105 U. S., 265; Morgan *vs.* Texas Cent. R. R., 32 Fed. Rep., 530.

And lastly, it is insisted in behalf of the United States that the defendant having presented for the signature of the judge minutes of the trial, and the same having been signed by the judge and incorporated in the record with the consent of the defendant, and the case having been heard and decided by the three judges upon such minutes, the record now contains a statement of the only exceptions subject to review sufficiently authenticated, and is therefore complete. And reference is made to Montana RR. Co. vs. Warren, 137 U. S., p. 348, Herbert vs. Butler, 97 U. S., 319.

Inasmuch as, in my opinion, the last objection above stated is fatal to the present application, the validity of the other objections will not be considered on this occasion, and the application will be denied upon the ground that the record as it stands contains all exceptions which have not been waived and abandoned in this case and that there is no occasion for any other or different bill of exceptions than the one already incorporated in the record.

This plainly appears, as it seems to me, from the above statement of the proceedings had in the cause. The defendant after the rendition of the verdict moved for a new trial, and also for an arrest of judgment. He founded those motions upon what had occurred at the trial, as stated in minutes of the trial prepared by him. These minutes of the trial were signed by the judge who tried the case,

the defendant consenting, and being filed by him became part of the record. These minutes of the trial were made with all deliberation and without suggestion of fraud or mistake or misapprehension. In these minutes certain exceptions which had been taken and noted at the trial were inserted and certain other exceptions which had been taken and noted at the trial omitted. By this action, in my opinion, the defendant abandoned all exceptions taken at the trial save only those which he had caused to be set down in the minutes of the trial prepared by him, and made by him a part of the record. The minutes of the trial as now appearing in the record have all the requirements of a bill of exceptions. It was made for the purpose of a review of the proceedings had at the trial, and upon it the case had been heard and decided by the three judges.

That hearing was not, as the present counsel for the defendant seems to understand, upon a motion for a new trial only, but also upon a motion in arrest of judgment made according to the notice "upon the exceptions taken at the trial and upon the pleadings and proceedings herein," which motion brought before the three judges for review all rulings made at the trial to which exceptions had been taken as well as all exceptions to the charge to the jury for which a writ of error would lie if such writ had been then authorized by law (Graham, Practice, p. 641). When they for the purpose of such a hearing the defendant caused such minutes of the trial to be filed, which he had himself procured to be approved and verified by the judge's signature, and from which he deliberately omitted the exceptions which he now seeks to have inserted in the record he, in my opinion, waived all the exceptions so omitted. Upon that record the case has been argued and decided by the three judges, and it is that record which is called for by the writ of error from the Supreme Court of the United States. There is in Vaughn *vs.* The State, 4 Mo., p. 290, a decision to the effect that a statute authorizing a bill of exceptions in

criminal cases does not give the right to a bill of exceptions in cases arising before the passage of the act, and when no bill of exceptions was allowed by law, but assuming that the statute of March 3, 1891, although enacted subsequent to the review of this case by the three judges, gives to the Supreme Court of the United States the right to review the record in this case upon writ of error, the statute applies to the record as it stood complete in the matter of the exceptions taken at the trial when the statute was passed. It had no effect to revive exceptions that had been waived and abandoned, nor does it, in my opinion, require or permit a second bill of exceptions to be incorporated into the record as it stood at the time of the passage of the act.

Upon these grounds, therefore, the application is denied, and it is permitted to add that if these grounds be found insufficient by the Supreme Court all detriment to the defendant will be avoided by their writ of mandamus.

UNITED STATES OF AMERICA,
SOUTHERN DISTRICT OF NEW YORK, } *ss.:*

I, John A. Shields, Clerk of the Circuit Court of the United States, in and for the Second Circuit and Southern District of New York, do hereby certify, that I have compared the preceding with the original opinion in the case of The United States against Peter J. Claassen on file and of record in my office, and that the same is a true and correct transcript therefrom, and of the whole of said original.

In testimony whereof, I have hereunto set my hand and affixed the seal of said court, at the City of New York, in the District and circuit above named, this 24th day of April, in the year of our Lord one thousand eight hundred and

ninety-one, and of our Independence the one hundred and fifteenth.

JOHN A. SHIELDS,
Clerk.

[Seal of U. S. Circuit Court, South Dist., New York.]

[INDORSEMENT:] Circuit Court of the United States for the Southern District of New York. The United States *vs.* Peter J. Claassen. (Certified Copy.) Decision, Benedict, J. Original filed April 23, 1891.

CIRCUIT COURT RULES, SOUTHERN DISTRICT N. Y.

Rule 67.

Whenever it shall be intended to move to set aside a verdict, except for irregularity, a case may be prepared by the party intending the motion, and a copy thereof served on the opposite party before judgment is rendered and entered upon such verdict, who may, within four days thereafter, propose amendments thereto, and serve a copy on the party who prepared the case, and if the parties cannot agree together in regard to such amendments, then, within four days thereafter, either party may give the other notice to appear within a convenient time, and not more than four days after service of such notice, before the judge who tried the cause, to have the case and amendments settled, and the judge shall thereupon correct and settle the same as he shall deem to consist with the truth of the facts, but if the parties shall omit within the several times above limited, unless the same shall be enlarged by a judge, the one to propose amendments and the other to notify an appearance before the judge, they shall respectively be deemed, the former to have agreed to the case as prepared and the latter to have agreed to the amendments as prepared; and if the party omit to make a case within the time above lim-

ited, unless the time shall be enlarged as aforesaid, he shall be deemed to have waived his right thereto.

Rule 68.

If judgment has been rendered upon a verdict the party intending to move for a new trial shall give four days' notice in writing to the opposite party of any motion to stay execution, and also of the petition intended to be filed pursuant to the 18th section of the Act of Sept. 24th, 1879, unless a shorter time be allowed by the court or a judge.

Rule 69.

Where exceptions to the opinion of the court are taken by either party on the trial of a cause, or there is a demurrer to evidence interposed, or a special verdict found, the party shall not be required to prepare his bill of exceptions at the trial, or his demurrer or statement of the evidence, or to put in form the special verdict, but shall merely reduce such exceptions to writing, or make a minute of the demurrer to the evidence and of the facts found specially by the jury, as the case may happen to be, and deliver it to the court; or the court will themselves, at the request of either party, note the point and the bill of exceptions, demurrer to evidence, and special verdict shall afterwards be drawn up and amended and settled within such times and under the same rules and regulations as are observed with respect to cases.

Rule 71.

When a bill of exceptions shall be taken on the trial, the same may before judgment be used instead of a case, on motion for a new trial, and notice of such motion, together with service of a copy of such bill of exceptions shall operate to stay all further proceedings until the decision of the court; provided, that proceedings shall not be longer stayed than if a case had been regularly made.

See Blatchford's Rules, pp. 409, 410.

CRIMINAL RULE OF THE CIRCUIT COURT.

MARCH 12, 1879.

For the purpose of securing a right of review to defendants in criminal cases tried in the Circuit Court of the United States for the Southern District of New York hereafter in all such cases where the defendant shall within three days after conviction file notice of a motion for a new trial upon exceptions taken at the trial, or a motion in arrest of judgment sentence will be deferred until the next criminal term of the court, in order to give opportunity for the hearing of such motion before a court to be composed of the Circuit judge and the two District judges authorized by law to hold the said terms of said court under Section 613 of the Revised Statutes of the United States. The court will sit for the purpose of such hearing on the second day of each of the exclusively criminal terms provided for in Section 658 of said Revised Statutes, at which time either party may move the hearing, and the same will be heard upon the minutes of the trial as settled by the judge who tried the case. The minutes so settled shall be printed by the moving party, and five copies thereof shall be filed before the first day of the term next subsequent to the term at which the trial was had, one of which copies shall be delivered to the District Attorney, at his request. A failure to file such copies will be deemed an abandonment of any motion of which notice may have been given in pursuance of this rule.

Supreme Court of the United States.

Ex Parte IN THE MATTER OF THE PETITION OF PETER J. CLAASSEN, FOR A WRIT OF MANDAMUS,

against

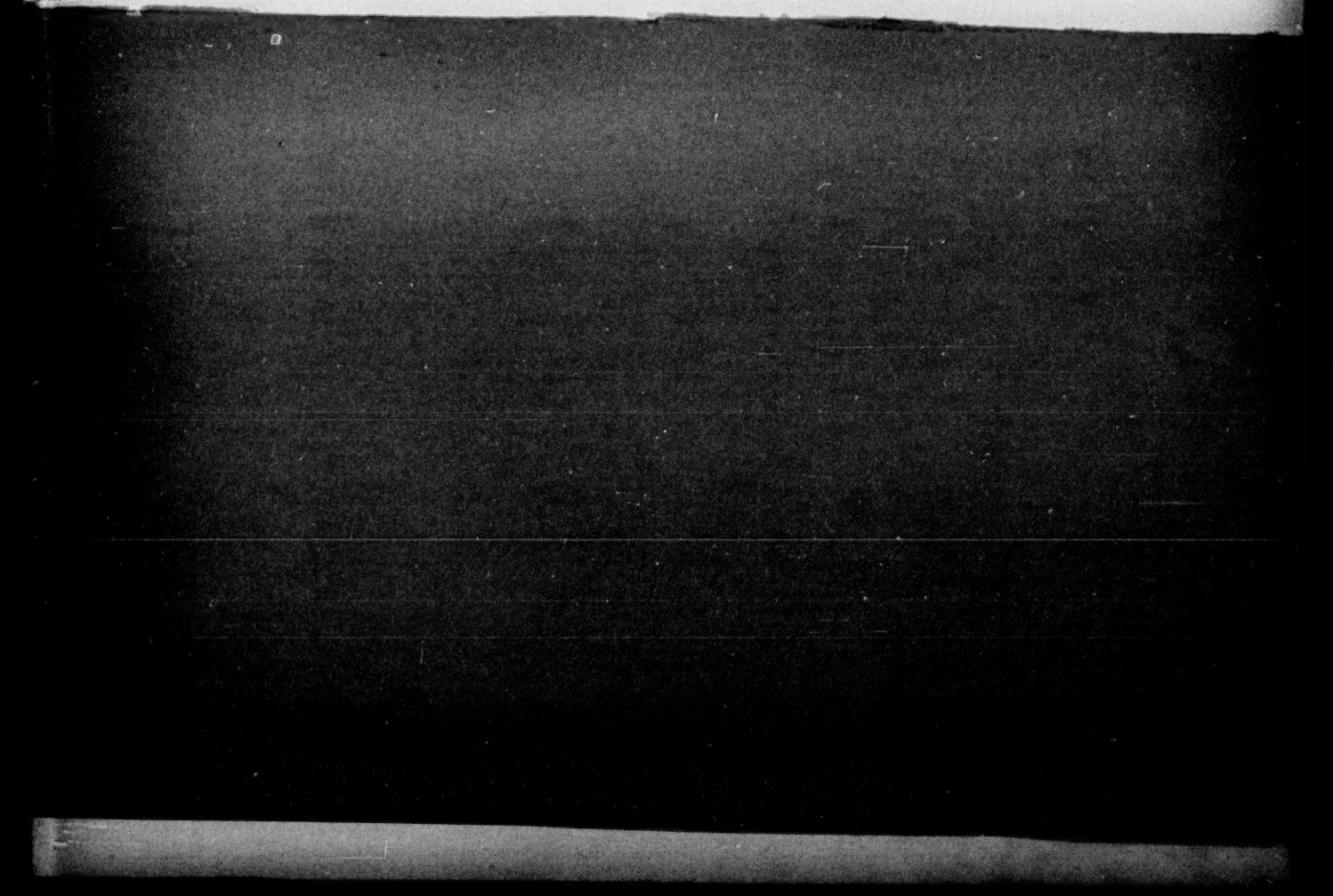
CHARLES L. BENEDICT, Judge of the Circuit Court of the United States for the Southern District of New York, and the United States of America.

PETITIONER'S BRIEF.

HECTOR M. HITCHINGS,

Attorney for Petitioner, 132 Nassau St., N. Y. City.

The Washington Law Reporter, Printers, 503 E St.



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against

CHARLES L. BENEDICT, Judge of the Circuit Court of the United States for the Southern District of New York, and the United States of America.

PETITIONER'S BRIEF.

STATEMENT.

The petitioner was indicted under Section 5209 of the Revised Statutes of the United States, for embezzlement and other crimes, as president of the Sixth National Bank of the City of New York.

He was brought to trial before Judge Charles L. Benedict and a jury, in May, 1890, and found guilty by said jury on May 28th, on the five counts which will be found set out at pages 29, 34, 36, 38, and 40 of the petition. In accordance with a criminal rule of said Circuit Court, a copy of which will be found set out in the supplemental papers at page 65, a motion for a new trial and in arrest of judgment was sued out promptly to the Court in Banc specified in said rule and a case was prepared, agreed upon, and settled as provided in Rule 67 of the Circuit Court rules, which will be found set out in the supplemental papers at page 63.

(See petition, p. 52.) The case as prepared with all endorsements will be found in Exhibit II, pp. 29–48. This case will be found to have been made to present simply one point, viz., that Section 5209 authorized the Circuit Court to try the *president* of a national bank; that the board of directors which elected the petitioner president was an illegal board and not duly qualified; that the petitioner elected by such illegal board never took the oath of office required by the Revised Statutes, and that in consequence of such defects he never became the actual president of the Sixth National Bank, and in consequence the Circuit Court never acquired jurisdiction of his person. (Pet., pp. 42–48.)

This motion came on for agument on the 24th day of October, 1890, before Hons. William J. Wallace, Charles L. Benedict, and Addison Brown, judges.

For some time prior to the return day prominent counsel in New York endeavored to procure the consent of the district attorney and of the counsel then acting for the petitioner to bring up and present other exceptions on the motion for a new trial, and failing in this, on the 24th day of October, Mr. John D. Townsend, on behalf of the petitioner, made request of the court that the argument might be postponed and other exceptions reviewed. He was poorly supported upon the motion by defendant's counsel and the application was denied. The motion was entirely oral, was unsupported by affidavits, no formal order was ever made or entered and no entry of the occurrence made upon the minute book of the clerk until April 16, 1891, six months after, when it was made at the request of the district attorney without notice to petitioner's counsel and without order of court. (See pp. 6 and 53 and certified transcript of docket filed with Judge Blatchford, March 21, on suing out writ of error.)

This explanation seems necessary in view of the new entry.

The Court in Banc heard the motion upon the one point

of jurisdiction, and decided the same on the 22d day of December, 1890, denying the motion without opinion.

After the decision of the Court in Banc, no motion was made to sentence the petitioner, but sentence was suspended to obtain the benefit of his evidence against James A. Simmons, and he was used as a witness for the prosecution in both the trials of Simmons which occurred in February and March, 1891. Such suspension was not due to any request of the petitioner. (Petition pp.).

On March 3, 1891, the President of the United States signed the Act of Congress entitled, "An Act to define and regulate the jurisdiction of the Courts of the United States," which act allowed a writ of error to this court in case of conviction of a capital *or otherwise infamous crime.*

Said act went into effect immediately upon the signing thereof (page 3.)

Subsequently, and on the 18th day of March, 1891, the petitioner was called up for sentence and was sentenced to serve a term of six years in the Erie County Penitentiary (p. 54.)

The writ of error, citation and assignment of errors had all been prepared under said act of March 3, and the moment sentence was pronounced, the writ and citation were presented to Judge Benedict for allowance. He took the papers to examine into the question, and the next day informed the petitioner's counsel that he was ready to grant the writ, but would refuse a stay, and thereupon, the application was withdrawn, and was made to Mr. Justice Blatchford, who, on the 21st day of March, 1891, granted the same (pp. 4, 48). On the same day, the petitioner's counsel filed in the Circuit Court clerk's office, at New York City, a specific assignment of errors as provided in Rule 35, of this court, promulgated November 3, 1890. (See Exhibit I, pp. 12–29.) On March 23, the United States filed a joinder in error which see (page 50.)

The March term of court at which the petitioner was

sentenced does not expire until the second Tuesday in May, 1891 (fol. 23).

The writ of error was made returnable by Mr. Justice Blatchford, on April 13, 1891, and on April 10 the petitioner's counsel, having reduced the stenographer's minutes of the trial from 700 pages of type-written matter to 185 pages, and having made a perfect and proper bill of exceptions, containing absolutely no evidence, and no exception that was not taken at the trial, and only such evidence as was necessary to properly present to this court the errors set out in the assignment, presented such bill of exceptions to the District Attorney and to Judge Benedict for settlement and allowance.

The District Attorney refused to receive it for reasons set out at fol. 21, and Judge Benedict to settle it because no notice had been given.

A copy of the bill of exceptions was thereupon and on the same day served on the District Attorney, and notice of settlement given for April 13, which was afterward enlarged to April 18, and the time to file the return enlarged to April 28th, and has since been enlarged to May 28th.

On April 18th the bill of exceptions was formally tendered to Judge Benedict, but ordered by him to remain in the custody of petitioner's counsel until the objections which were then presented and urged by the District Attorney were disposed of.

No written objections were ever served upon the petitioner's attorney, but counsel was apprised, before argument, that the District Attorney would claim that the case made on the motion for a new trial was a bill of exceptions, and no other could be presented or allowed.

The objections were argued, briefs presented, and on the 23d of April, in the afternoon, the written opinion and decision of Judge Benedict set out in the supplemental papers, page , was filed in the Circuit Court clerk's office.

This decision denies to the petitioner the bill of excep-

tions presented, on the ground that the petitioner is concluded by the one already filed, and has waived all objections not specified therein.

The entire evidence was taken down by a stenographer, together with all the exceptions, and the whole is preserved in his minutes.

Points.

I.

The writ of mandamus is the proper and appropriate remedy where a Circuit Judge refuses to settle a bill of exceptions properly presented, and containing within itself only those exceptions which were taken at the trial and before the jury retired.

Ex parte Crane, 20 U. S. [2 Peters], 190.

Ex parte Chateaugay Ore & Iron Co., 128 U. S., 544.

In the latter case the Court say: "A writ of mandamus "may properly be issued by this court to compel the judge "of an inferior court to settle and sign a bill of exceptions. "(*Ex parte* Crane, 30 U. S. [5 Peters], 190).

"Such a writ does not undertake to control the judg- "ment of the judge as to how he shall frame the bill of "exceptions, or as to how he shall decide any point arising "on its settlement, but it only compels him to settle and "sign it in some form."

II.

It is entirely unnecessary to reduce exceptions taken at the trial to a formal bill of exceptions, at the time the exceptions are taken, but exceptions, duly taken at the time of the trial, may subsequently be reduced to form, and settled, signed and allowed.

Hunnicutt *v.* Peyton, 102 U. S., 333.

Davis *v.* Patrick, 122 U. S., 138.

Simpson *v.* Dall, 3 Wallace, 460.

Upon a writ of error to this court, such a bill of exceptions is properly presented *after* judgment or sentence, provided the same be tendered at the same term at which the judgment was rendered, and within a reasonable time after such judgment.

Hunnicutt *v.* Peyton, *supra.*
Muhler *v.* Ehlers, 91 U. S., 249.
U. S. *v.* Breitling, 20 How., 553.
Stanton *v.* Embrey, 93 U. S., 548.

It was utterly impossible for the petitioner to prepare and serve a bill of exceptions before sentence for the reason that he could not know before sentence was pronounced whether a writ of error would lie to this court. It was the severity of the sentence and fact that he was sentenced to imprisonment in a *penitentiary* for a longer period than one year that made the petitioner's crime an infamous one, and gave this court jurisdiction.

United States *v.* De Walt. 128 U. S., 393.
United States *v.* Hade, 10 Chi. Leg. News, 22.
Mackin *v.* United States, 117 U. S., 352.

Section 5209 provides: "A person found guilty shall be "deemed guilty of a misdemeanor and shall be imprisoned "not less than five nor more than ten years."

It does not provide where imprisonment shall be executed.

Section 5541 provides that in such case "the court by "which the sentence is passed *may* order the same to be "executed in any State jail or penitentiary, &c."

The place of imprisonment is discretionary with the judge.

Ex parte Karstendick, 93 U. S., 396.

If, then, the imprisonment is not in a State jail or peni-

tentiary or at hard labor the crime is not an infamous crime, but is as the statute calls it a misdemeanor.

See cases *supra*.

So many of the objections of the district attorney were made in and are answered by the case of Hunnicutt *v.* Peyton, that I plead that as an excuse for printing the material parts of Judge Strong's opinion in that case, as follows (pages):

"The verdict was rendered February 17, 1877, and judg-
"ment thereon entered the same day. On February 19,
"motion was made for a new trial, which was denied Febru-
"ary 20th. February 24, the writ of error was sued out
"and tested on that day. The citation was issued February
"24th, and returned by the Marshal, received in his office
"September 3d, and served the same day. Defendant's bill
"of exceptions upon which their assignment of error was
"founded, was signed by the judge February 28th, and filed
"March 1st. This was during the term at which the cause
"was tried, but eleven days after the verdict was rendered.
"Objection was made by plaintiff's counsel when the bill of
"exceptions was presented on the ground that the same
"was not presented for signature within the time limited
"by the rule of court. That rule was as follows: "No bill
"of exceptions will be signed, unless presented to the judge
"within five days after the close of the trial, unless further
"time be allowed by the court." No objection was made to
"the correctness of the bills or to their signature, because a
"writ of error had been sued out. *On the 1st of March*, an
"order was made by the court extending the time for pre-
"senting and filing the bills until that day (the plaintiffs
"objecting to the order), and accordingly the bills were
"then filed.

"It is now insisted that the bills of exceptions cannot be
"considered a part of the record and that they are not
"properly here for review. For this several reasons are

"advanced, the first of which is that the presentation to the "judge was not in the time prescribed by the rules of the "court. But the rule requiring the presentation of bills for "the signature of the judge within five days is not a rule "which controls his action. He may depart from it to ef- "fectuate justice. Stanton *vs.* Embrey, 93 U. S., 548. It is "a direction to the parties and it expressly reserves the "power to enlarge the time. It is no doubt necessary that "exceptions should be taken, and at least noted before the "rendition of the verdict; but the reduction of the bills to "form, and the signature of the judge to the bills, required "for their attestation, or, as said in the Statute of Westmin- "ister, "*for a testimony*" may be afterward, *during the term.* "In practice it is not usual to reduce bills of exceptions to "form and to obtain the signature of the judge. Nor is it "necessary. It would greatly and uselessly retard the busi- "ness of courts were it required that every time an exception "is taken, the progress of the trial should be stayed, until "the bill could be reduced to form and signed by the judge. "For this reason it has always been held that the ex- "ception need only be noted at the time it is made, and "may be reduced to form *within a reasonable time after* "*the trial* is over. United States *vs.* Breitling, 2 How., 252; "Stanton *vs.* Embry, *supra*; Dredge *vs.* Forsyth, 2 Black., 564. "The time within which the signature of the judge must "be applied for, if within the term, is left to the discretion "of the judge who noted the exception when it was made. "It may depend much upon the nature of the bills. *Some* "*require much more time for preparation than others.* It is "true a judge cannot be permitted to make up a *statement* "*of facts* after the writ is issued upon which the case shall "be heard. Generes *vs.* Bonnemer, 7 Wall., 564. That "is quite a different matter. But when an exception has "been taken at the trial and noted, reducing the exception "to form afterward and noting it is not making a new case; "it is merely verifying the case as it appeared on the trial.

"It is further urged by the plaintiffs that the defendants "waived their exceptions by suing out the writ of error be- "fore the signature of the judge was obtained."

Here the justice goes into an elaborate examination of the English law and cases, and says:

"It is not, therefore, by any means settled, even in Eng- "land, that suing out a writ of error is a waiver of un- "signed bills of exceptions. We know of no decision in "this country that asserts or gives any countenance to such "a rule, or any reason that justifies it, unless it be one in "New York, to which we shall refer (no application). True, "a writ of error here, as in England, is supposed to remove "the record of the court to which it is directed into the "superior tribunal. But this is a mere fiction. In neither "country is the record itself actually sent up. A transcript "only is sent. * * * Much more, it would seem, must "the court to which the writ is sent have power, during "the term in which the case is tried, to puts its records and "proceedings in form to return them in obedience to the "writ. If that cannot be done great hardship and injustice "would in many cases be the result. As we have said, bills "of exceptions cannot always be formally prepared until a "considerable time after verdict *and judgment.* They may "require in some cases a full statement of almost all that "occurred at the trial. Papers necessary to be incorporated "may be mislaid or withheld by the opposite party. The "charge of the judge to which exception has been taken "may not have been filed, or sickness may have interfered.

"*Meanwhile judgment on the verdict may have been entered,* "*and unless the party can protect himself by a writ of error, exe-* "*cution may follow. For these reasons the universal practice is* "*to give reasonable* time to make up a bill of exceptions and "obtain the signature. This is not altering the record, it is "completing it. It is not exercising jurisdiction over the "case. It is merely putting into form the record statement "of what was done before the writ of error was sent down.

"In Brown *v.* Bissell (1 Dougl. [Mich], 273), where a bill of "exceptions returned with the writ of error appeared to have "been signed after the writ was sued out, *it was held to be at "most, whether at common law or under the statute, a mere ir-"regularity, which was waived by a joinder in error.* Witbeck "*v.* Waine, 8 How. (N, Y.), Pr. 433."

In speaking of filing *nunc pro tunc*, the judge further says; "*Confessedly it may be signed after judgment*, as of a date "before, and be effective, &c."

This opinion says that the question is left to the discretion of the trial judge as to whether the bill is prepared and presented for allowance with due diligence, but this discretion is a legal one, and if, as a matter of fact, a properly drawn bill is presented within a reasonable time it is the judge's duty to allow it.

U. S. *v.* Whittier, 13 Fed'l Rep'r, 535.
Mackin *v.* United States, 23 Fed. R., 334.
Cases cited *supra*, Point 1.

The bill of exceptions made therefore by the petitioner, consisting of one hundred and eighty-five (185) pages, made within twenty-one days after the imposition of the sentence, reducing to that compass more than 700 pages of stenographer's minutes, being presented at the same term at which judgment was rendered, was made and presented with all due diligence, and if it actually and clearly presents to this court the questions sought to be reviewed, should have been settled and allowed by the judge.

This is the first case that has ever come to this court under the act of March 3, 1891. This court has as yet made no rules relating to the time and manner of making bills of exceptions or presenting or having them allowed, nor has any other court, and in such case it is respectfully submitted much indulgence should be granted to the pioneer trying to hew out a path for himself and others.

III.

The case made and settled on the motion for a new trial was in no respect a bill of exceptions; should not be returned to this court, and if returned will not be considered by the court, and the petitioner, therefore, should he fail to get this bill allowed, will come into this court, without any fault of his own, without a bill of exceptions, and consequently without any question for review except the question of jurisdiction.

Kerr *v.* Clampitt, 95 U. S. (5 Otto), 188.
Montana Railway Co. *v.* Warren, 137 U. S., 348.

The head note of Kerr *vs.* Clampitt, reads:

"This court has no jurisdiction to revise the action of an "inferior court upon the question of either granting or re- "fusing a new trial, and the final judgment of such court "cannot be examined through its rulings upon that ques- "tion. If when the final judgment is brought here for re- "view by writ of error, no other documents are presented "for consideration than such as were before the inferior "court upon the application for a new trial, this court can- "not look into them, and if error is not otherwise disclosed "by the record, the judgment will be affirmed. The court "must have before it a bill of exceptions or what is equiva- "lent thereto upon which the final judgment of the court "below was reviewed or it will not examine into any alleged "errors except such as are otherwise apparent on the face "of the record."

In the case cited a motion for a new trial was made and "a statement or motion for a new trial" was filed. At the foot of the statement is the following agreement signed by attorneys for both parties:

"It is hereby agreed that the foregoing shall constitute "the statement on motion for a new trial in the above- "entitled cause, and is correct."

Indorsed on the statement is the following: "Settled statement on new trial, filed March 20, 1875."

Justice Field in the opinion, says, p. 190: "This state-" ment (referring to statement of errors under Utah laws) is " only another name for a bill of exceptions, and is subject " to similar rules. It will often embody substantially the " same matters which are presented on a motion for a new " trial, and it is not uncommon for counsel to stipulate that " the statement on the motion shall be treated as a statement " or bill of exceptions on appeal from the judgment; *but* " *unless it is so stipulated the statement intended for the motion* " *cannot be used on appeal from the judgment or considered* " *here.*"

In the case at bar, I desire to ask attention briefly to the following considerations:

1st. Prior to the act of March 3, 1891, there was *no appeal* or *writ of error* from the conviction at Circuit to any court. Consequently, no bill of exceptions was proper or of any force or validity, except under Rule 71, for the purpose of a motion for a new trial, and as the final result of that motion would not be reviewed here, such bill of exceptions would be of no avail here.

2d. The Court in Banc was a creation of the judges of the Circuit Court by a rule made by them (see Rule, Supp., p. 65), and had no other foundation or authority.

Section 613 R. S. reads: "The terms of the Circuit Court " for the Southern District of New York appointed ex-" clusively for the trial and disposal of criminal business, " may be held by the Circuit judge of the second judicial " court and the district judges for the Southern and Eastern " Districts of New York, or any one of said three judges."

Section 726 reads: "All of *said* courts shall have the " power to grant new trials in cases where there has been " a trial by jury, for reasons for which new trials have " usually been granted in the courts of law."

The Court in Banc is not specified in *said* courts (section 725).

"Section 918. The several Circuit and district courts may "from time to time, *and in any manner not inconsistent* "with any law of the United States or with any rule pre- "scribed by the Supreme Court under the preceding sec- "tion, make rules and orders directing the returning of "writs and processes, the filing of pleadings, the taking of "rules, the entering and making up of judgments by de- "fault, and other matters in vacation, and otherwise regulate "their own practice as may be necessary or convenient for "the advancement of justice and the prevention of delays "in proceedings."

By the criminal rule the Court in Banc became a new and appellate court to exercise powers directly repugnant to §726 *supra*. Under §613 all three judges could have tried the case in the first instance, and had they done so, could have sat on a motion for a new trial, but they had no power to sit and pass upon such a motion when heard before one only of their number. It is respectfully submitted that United States Courts are creatures of the Constitution and Statutes of the United States, and therefore the Court in Banc was an unconstitutional body, and all proceedings before it without legal authority and its acts of no binding force. In consequence the petitioner is wholly unaffected by its denial of his motion for a new trial and its denial of leave to bring up new exceptions.

The singular position is taken by the trial justice—1st, that the petitioner applied to the Court in Banc for leave to make a bill of exceptions and bring up the errors now complained of, and this being denied him the question of his lack of right to make and present a bill is *res adjudicata* and none can now be made or allowed; and, 2d, that the motion for a new trial being made according to the notice

upon the pleadings and proceedings as a matter of fact, that motion did bring up all exceptions that were made at the trial, although not in the printed case, and although leave to put them there was denied and hence these exceptions have been passed upon.

The two positions seem to me utterly inconsistent, and both of them without force for the reasons stated above.

The motion in arrest of judgment, had no greater force or effect than the motion for a new trial, and cannot be considered in this court.

Canal, &c., R. R. Co. *vs.* Hart, 114 U. S., 654.

3. The case before such court in Banc, was made pursuant to Rule 67, which speaks of it as a case; does not contain the words bill of exceptions or anything similar from one end to the other; it has at its close the words, "Settled as above by consent, and argument to be heard at October term, July 9, 1890, Charles L. Benedict," is endorsed: "The United States *vs.* Claassen, Printed *Case* as settled. File mark: "U. S. Circuit Court, July 9, 1890, John A. Shields, clerk." (See pp. 29, 48.)

The case of Herbert *vs.* Butler, 97 U. S., 319, cited by the justice was entirely different. It had every essential of a bill of exceptions, was made and settled for a bill of exceptions, but had as an endorsement "Case and exceptions" and this court held that immaterial.

4th. The joinder in error by the District Attorney in the specific assignment of errors of this petitioner, is a distinct waiver of the point that the case is a bill of exceptions. That joinder reads: "And he prays that the said Supreme Court, before the justices thereof, now here, may proceed to examine, as well the record and proceedings aforesaid, as *the matters above assigned for error*" (p. 50.)

If he desired to avail himself of his present objections, he should have pleaded specially the facts as a bar.

Graham's Pr. (N. Y.), 957, 958.

5. The Statute of March 3, gives the writ of error from the Circuit Court direct to this court as a writ of right.

It is therefore respectfully submitted that the writ carries with it all the incidents necessary to make it effective here and among others, and as a matter of course, a bill of exceptions.

IV.

The errors assigned for review all present serious questions for the consideration of this court, and in the writer's opinion will all be sustained.

One of them consists in an exception to the language of the trial justice in his charge to the jury, which language I have been informed by several of the jury, led to the conviction of the petitioner.

The language excepted to is as follows: "I must remark further to you that Simmons is not called to corroborate him (Claassen) as to these dealings and sayings between him and Simmons, nor is his absence accounted for, and it is a rule that where a man fails to put a witness on the stand who is at hand and can be produced, it is a fair presumption that if produced he would not corroborate him. That rule should be noticed here, because," etc.

This ruling was clearly erroneous.

Bleecker *vs.* Johnson, 69 N. Y., 313.
State *vs.* Rosier, 55 Iowa, 517.
Commonwealth *vs.* Webster, 5 Cushing, 595, 316.
Abbot's Trial Brief, Criminal, Sec. 765.

In the first case, *supra*, the court say: "The circum-"stance of the non-production of the absent defendant, "although very slight, might have been submitted to the "consideration of the jury, but the force of the circumstance

"should not be left to them, *and it was error to charge that "the plaintiff was bound to produce him, and not having done "so the jury might infer that his evidence would have been pre-"judicial to him.*"

Gordon *vs.* The People, 33 N. Y., 401."

On that charge the court set aside the conviction.

This court has frequently held that it would not encourage technicalities to deprive a man of a review which he would otherwise seem to be entitled to when the case presented by him is a meritorious one.

V.

It is further respectfully urged that some suggestion be made by this court, in deciding this question, in regard to admitting the petitioner to bail and the amount thereof. The petitioner has been in Ludlow street jail since May 28, 1891. Prior to his conviction he was admitted to bail in $30,000, and this sum he gave and could give again. To increase it, however, would render it impossible for him to give bail and would keep him incarcerated, and thus the supersedeas of the writ and the stay would be of little advantage to him.

Washington, April 28, 1891.

Respectfully submitted,

HECTOR M. HITCHINGS,

Attorney for Petitioner, 132 Nassau St., N. Y. City.

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Supreme Court of the United States.

Ex parte, In the Matter of the petition of PETER J. CLAASSEN, for a writ of mandamus,

AGAINST

CHARLES L. BENEDICT, Judge of the Circuit Court of the United States for the Southern District of New York, and the United States of America.

Statement.

The petitioner was indicted under Section 5209 of the Revised Statutes of the United States, for embezzlement and other crimes, as President of the Sixth National Bank of the City of New York.

He was brought to trial before Judge Charles L. Benedict and a jury, in May, 1890, and found guilty by said jury on May 18th. A motion for a new trial was sued out under the rules of procedure of said Circuit Court, civil and criminal, and upon said motion, a case as provided by Rule 67 of the Circuit Court Rules for the Southern District of New York, was made and prepared. The motion for a new trial was heard before the Court in Banc, composed of Mr. Justice Wal-

lace, Mr. Justice Brown and Mr. Justice Benedict, on the 24th day of October, 1890, and at the next term of said Court said motion was denied.

The only question presented upon said motion was the jurisdiction of the Circuit Court to try the petitioner.

After the decision of said Court in Banc, which occurred in December, 1890, no motion was made to sentence said petitioner, but sentence was suspended to enable him to be used as a witness on the part of the United States, in an action brought by the United States against James A. Simmons, for aiding and abetting said petitioner in the crimes of which he had been convicted.

On March 3d, 1891, the petitioner not having been sentenced, the President approved an Act of Congress, entitled "An Act to define and regulate the jurisdiction of the Courts of the United States;" which said Act, upon the signature of the President, went into immediate effect.

after he had been used as a witness in the case against Simmons

On March 18th, 1891, the petitioner was called up for sentence, and was sentenced by the Court to serve a term of six [6] years in the Erie County Penitentiary.

At the time of sentence, application was made to Mr. Justice Benedict for a writ of error to this Court, under said Act of March 3d, 1891, and said Justice, after keeping the matter for a day, decided that the writ was a writ of right to which the petitioner was absolutely entitled, but that he would not grant a stay of execution of sentence, and in consequence the application was withdrawn, and on the 21st day of March, was made to Mr. Justice Blatchford at Washington, and was by him granted, being made returnable on the 13th day of April, 1891.

That on the same day that the writ was allowed an assignment of errors, setting out specifically the errors complained of, and which the petitioner desired argued

in this Court, was filed in the Clerk's office of the Circuit Court.

That on the 23d day of March, 1891, a joinder in error was filed in said Clerk's office and on the 25th served on the petitioner's attorney.

That a bill of exceptions containing the evidence necessary to present the exceptions set out in the assignment of errors was presented for settlement and allowance on April 10th, 1891, twenty-one (21) days after the writ of error was sued out. That said bill of exceptions subsequently came up, on notice, on April 18th, 1891, before Mr. Justice Benedict, for settlement and allowance, and at that time objections were interposed by the District Attorney to the making and settlement of any new bill of exceptions, and these objections were, on the 23d day of April, 1891, sustained by said Justice and settlement disallowed. The objections did not go to the contents of the bill of exceptions, but to the fact that the petitioner was not entitled to present any bill of exceptions at this time, being precluded by the case made on the motion for a new trial.

The March term at which the petitioner was sentenced does not expire until the second Tuesday of May, 1891.

The petitioner respectfully asks leave to reserve, until the return of a rule to show cause, the argument of the objections merely endeavoring to show by this brief:

1st. That the writ of mandamus is the appropriate remedy.

2d. That the bill of exceptions is properly made after judgment, if presented at the same Term at which the judgment or sentence is rendered.

3d. That the errors complained of are serious and entitle the petitioner to a reversal of the judgment against him.

4. That he is entitled to a Bill of Exceptions in support of his assignment of errors is not precluded by the motion for a new trial or anything that occurred on that motion

Points.

I.

The writ of mandamus is the proper and appropriate remedy where a Circuit Judge refuses to settle a bill of exceptions properly presented, and containing within itself only those exceptions which were taken at the trial and before the jury retired.

Ex parte, Crane, 20 U. S. [5 Peters], 190.
Ex parte, Chateaugay Ore & Iron Co., 128 U. S., 544.

In the latter case the Court say: "A writ of mandamus may properly be issued by this Court to compel the judge of an inferior Court to settle and sign a Bill of Exceptions. (*Ex parte*, Crane, 30 U.S. [5 Peters], 190.) Such a writ does not undertake to control the judgment of the judge as to how he shall frame the Bill of Exceptions or as to how he shall decide any point arising on its settlement, but it only compels him to settle and sign it in some form."

II.

It is entirely unnecessary to reduce exceptions taken at the trial to a formal Bill of Exceptions, at the time the exceptions are taken, but exceptions duly taken at the time of the trial may subsequently be reduced to form, and settled, signed and allowed.

Hunnicutt *v.* Peyton, 102 U. S., 333.
Davis *v.* Patrick, 122 U. S., 138.
Simpson *v.* Dall, 3 Wallace, 460.

Upon a writ of error to this Court, such bill of exceptions is properly presented *after* judgment or sentence, provided the same be tendered at the same term at which the judgment was rendered, and within a reasonable time after such judgment.

Hunnicutt *v.* Peyton, *supra.*
Muller *v.* Ehlers, 91 U. S., 249.
U. S. *v.* Breitling, 20 How., 553.
Stanton *v.* Embrey, 93 U. S., 548.

The bill of exceptions made therefore by the petitioner, consisting of one hundred and eighty-five (185) pages, made within twenty-one days after the imposition of the sentence, reducing to that compass more than 700 pages of stenographer's minutes, being presented at the same term at which judgment was rendered, was made and presented with all due diligence, and if it actually and clearly presents to this Court the questions sought to be reviewed, should have been settled and allowed by the Judge.

The case of Hunnicut *v.* Peyton, *supra*, appears to have disposed of most all the objections raised by the District Attorney, so much so, that the trial Justice put his decision upon the sole and single ground that the case made on motion for a new trial was substantially a bill of exceptions, and none other could be made.

III.

The case made and settled on the motion for a new trial was in no respect a bill of exceptions, and if returned to this Court will not be considered by the Court, and the petitioner will come into this Court without any fault of his own, without a bill of excep-

tions, and consequently, without any question for review, except the question of jurisdiction.

Kerr *v.* Clampitt, 95 U. S. (5 Otto), 188.
Montana Railway Co. *v.* Warren, 137 U. S., 348.

Were this a writ of error to review the decision of the Court in Banc, it is conceded that nothing but the point before that Court could be raised or argued, and the case settled for that argument would be conclusive, but this is a writ of error to review errors committed by the Judge at the Trial Term.

Again, complying with the rule of this Court, promulgated November 3rd, 1890, the petitioner filed in the Clerk's Office of said Circuit Court on taking out his writ, a specific assignment of errors to which assignment of errors the United States, through the District Attorney, filed a joinder in error, thereby making the errors complained of in such assignment those which are to be argued and passed upon by this Court, those errors having nothing to do with the error argued on the motion of a new trial, and do not mention it.

The learned District Attorney was apprised by the filing of the assignment of errors just what points the petitioner desired to present for review, and if such points could not be legitimately raised, it was his duty to move this Court to strike the same from the files and to prevent the same coming before this Court upon the return ; not having done so, he has waived the right to claim that those exceptions were not properly before the Court.

Hunnicut v. Peyton, *supra.*

IV.

One of the exceptions presented by the assignment to this Court, consists in an exception to the language of the Trial Justice in his charge to the jury, which language I have been informed by several of the jury, led to the conviction of the petitioner.

The language of the Judge is as follows: "I must remark further to you that Simmons is not called to corroborate him (Claassen) as to these dealings and sayings between him and Simmons, nor is his absence accounted for, and it is a rule that where a man fails to put a witness on the stand who is at hand and can be produced, it is a fair presumption that if produced he would not corroborate him. That rule should be noticed here, because," etc.

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On that charge the Court set aside the conviction.

Respectfully submitted,

HECTOR M. HITCHINGS,
Counsel for Petitioner.

In the Supreme Court of the United States.

PETER J. CLAASEN
vs.
UNITED STATES. } No.

MOTION TO QUASH SUPERSEDEAS.

W. H. H. MILLER,
Attorney-General.

In the Supreme Court of the United States.

PETER J. CLAASEN
vs.
UNITED STATES. } No.

MOTION TO QUASH SUPERSEDEAS.

The United States moves the court to annul and set aside the supersedeas and stay of proceedings in the above entitled case, for the reason that the making of the order granting the same by the circuit justice was unauthorized by law.

W. H. H. MILLER,
Attorney-General.

MEMORANDUM OF POINTS.

Prior to the act of March 3, 1879 (Supplement to Revised Statutes, p. 451), the statutes provided for no writ of error in criminal cases. By that statute a writ to review the judgment of the district court in the circuit court was provided for, depending, however, upon the legal discretion of the judge or justice of the circuit court.

By the same statute provision for a supersedeas and the giving of bail is made Criminal cases were reviewable here on certificate of division. (Revised Statutes, 651 and 697.) Such continued to be the law with reference to all criminal proceedings in the Federal courts until the act of February 6, 1889 (25 Stat. L., 655). By section 6 of that act a writ of error is allowed in all cases of conviction of crime, the punishment for which provided by law is death, as a matter of right for the review of the case in the Supreme Court, and such writ of error is made to operate as a stay of proceedings. Thus the law stood, authorizing writs of error for the review of the judgments of the district courts in the circuit courts, and for the review of the judgments of the circuit courts in the Supreme Court on error until the passage of the act of March 3, 1891. Section 5 of the last named act provides for writs of error from the district and circuit courts direct to the Supreme Court, among others in all cases wherein the conviction is for an infamous crime. It will be observed that in each of the former acts named, including section 651, express provision was made for writs of supersedeas and stay of execution.

In the act of March 3, 1891, in section 4, it is provided:

> That all appeals by writs of error or otherwise, from the district courts, shall only be subject to review in the Supreme Court of the United States or in the circuit court of appeals hereby established, as is hereinafter provided, and the review, by appeal, by writ of error, or otherwise, from the existing circuit courts shall be had only in the Supreme Court

> of the United States or in the circuit courts of appeals hereby established *according to the provisions of this act regulating the same.*

In section 11, of the same act, is found the following provision:

> And all provisions of law now in force regulating the methods and system of review, through appeals or writs of error, shall regulate the methods and system of appeals and writs of error provided for in this act in respect of the circuit courts of appeals, including all provisions for bonds or other securities to be required and taken on such appeals and writs of error, and any judge of the circuit courts of appeals, in respect of cases brought or to be brought to that court, shall have the same powers and duties as to the allowance of appeals or writs of error and the condition of such allowance as now by law belong to the justices or judges in respect of the existing courts of the United States respectively.

As will be seen, this provision incorporates into the laws regulating appeals or writs of error to the circuit courts all existing provisions with reference to the review of judgments in the Federal courts, but it does not apply to provisions for review in the Supreme Court.

The joint resolution of March 3, 1891, contains the following provision:

> That nothing in said act shall be held or construed in any wise to impair the jurisdiction of the Supreme Court or any circuit court of the United States in any case now pending before it, or in respect of any case wherein the writ of error or the appeal shall have been sued out or taken to any of said courts before the 1st day of July, anno Domini 1891.

If in this sentence the word "affect" had been used instead of the word "impair," it would be plain, I think, that appeals under the law of March 3 could not be taken to this court until after the 1st of July; but the word "impair" being used seems to leave the aggrieved party at liberty to take his writ of error or appeal to this court, or to the original circuit or new circuit court, as he may prefer, until July 1.

Such being the statutes, there seems to be no direct provision for a supersedeas upon a writ of error to this court in a criminal case and we must inquire, therefore, whether such supersedeas is authorized by implication. As a starting point, I suppose, it must be assumed that the court has no common law jurisdiction in a criminal case. Whatever powers the court may exercise must come directly or indirectly from legislation. Thus it has been held that this court can not issue even a writ of habeas corpus, except under an act of Congress. (*Ex parte Bollman & Swartwout*, 4 Cranch, 75, on page 93.)

Indeed it is very doubtful whether a writ of error at common law carried a supersedeas as matter of course, although there are some indications that it did. Thus in Hale's Pleas of the Crown, vol. 2, p. 213, I find the following:

> And so note a difference between a writ of error and a certiorari; the former is a supersedeas to the issuing of execution from the time of the delivery of the writ till the day of the return be past, but then if the plaintiff proceed not to the removal of the record, execution shall be granted for his delay; but a certiorari is a supersedeas from the time of the delivery thereof forever, unless a *procedendo* issue.

On the other hand, in Wharton's Criminal Pleadings and Practice, at section 783, it is laid down that at common law a writ of error does not discharge from custody in cases not capital, but stays execution in capital cases. And in Archibald's Criminal Practice and Pleading, vol. 1, page 624, it is laid down that in misdemeanors, at common law, the defendant may give bail. The reason taken for the distinction between misdemeanors and felonies is that in felonies the person who stands convicted has forfeited all his rights to the Crown and it is for the Crown, not for the court, to say whether they shall be restored.

In New York, and indeed most of the States, it is provided that a writ of error with stay of execution may be granted by the appellate court or one or more of the judges, the granting of the same being the exercise of a legal discretion (*People* v. *Holmes*, 3 Parker, 567).

The statutes, in a number of the States, are collated in Archbold's Criminal Practice and Pleading (pp. 615, etc.). (All citations from Archbold are from the eighth edition, with Pomeroy's notes.)

These various statutes seem to indicate that it is at least doubtful whether the power, in a single judge, to grant a stay of proceedings in a criminal cause is not dependent upon statutes, even in the State courts, and the question would be more doubtful in this court, where the power to issue any writ is statutory. However this may be, that the power of this court as a court to issue a writ of supersedeas in a criminal case is an incident to its appellate jurisdiction is, I think, clear, under section 716 of the Revised Statutes, being a part of section 14 of the original judiciary act.

Section 716 reads as follows:

> The Supreme Court and the circuit and district courts shall have power to issue writs of *scire facias*. They shall also have power to issue all writs not specifically provided for by statute, which may be necessary for the exercise of their respective jurisdictions and agreeable to the usage and principles of law.

In a number of cases it has been held that this statute authorizes the courts to issue writs of *supersedeas*. (*Ex parte Milwaukee Railroad Company*, 5 Wallace, 188; *Hardyman* v. *Anderson*, 4 Howard, 640; *Hogan* v. *Ross*, 11 Howard, 294.)

Whether the statute authorize a single judge to exercise this power quere.

It is to be noted that wherever there has been a purpose to grant the power to exercise any judicial function to a single judge rather than to the court, that power has been granted expressly, as in cases of *ne exeat*, *habeas corpus*, power to grant writs of error, injunction, etc.

So in the act of 1879, *supra*, provision is made for a stay and the taking of bail by a circuit justice or circuit judge.

On the other hand, many powers are granted only to the court, as the power to grant writs of prohibition, mandamus, etc.

The question also arises whether it is competent for the circuit court or the district court to grant the *supersedeas* and take bail pending a writ of error. The granting of such *supersedeas* and the taking of such bail does not seem to be necessary to the exercise of the jurisdiction of those courts within section 716. At any rate all of these questions are very important.

It would seem in any event if the power is to be exercised by those courts, and especially by a single judge or justice, that it ought to be in conformity to some rule promulgated by the court which might be well understood not only in this court, but in each of the courts wherein such cases are to be tried. It is very important, as these questions, under the new statute, are arising on every hand, that the practice shall be well understood.

It will be observed, of course, that what has been said here has been said upon slight opportunity for examination and rather with a view to aiding the court to arrive at a proper rule than to the advocacy of any particular motion.

W. H. H. MILLER,
Attorney-General.